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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

AIU INSURANCE COMPANY, AMERICAN FIDELITY COMPANY, AMERICAN HOME ASSURANCE COMPANY, BIRMINGHAM FIRE INSURANCE COMPANY OF PENNSYLVANIA, COMMERCE AND INDUSTRY INSURANCE COMPANY, GRANITE STATE INSURANCE COMPANY, INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, NEW HAMPSHIRE INDEMNITY COMPANY, INC., and NEW HAMPSHIRE INSURANCE COMPANY,

Petitioners,

v.

SUPERINTENDENT, MAINE BUREAU OF INSURANCE,

Respondent.

Petition for a Writ of Certiorari to the Maine Supreme Judicial Court

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

MAY AN INDIVIDUAL, CONSISTENT WITH DUE PROCESS, BE BARRED FROM SEEKING JUST COMPENSATION FOR THE INDIVIDUAL DAMAGES IT SUFFERED FROM A REGULATORY "TAKING" BECAUSE IT DID NOT INTERVENE AND PRESENT ITS DAMAGES CLAIMS IN A TRADE ASSOCIATION'S ACTION THAT SOUGHT ONLY DECLARATORY AND EQUITABLE RELIEF?

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OPINIONS BELOW

The opinion of the Supreme Judicial Court of Maine is reported at 600 A.2d 1115 (Me. 1991), a copy of which is reproduced as Appendix B. The opinion of the Superior Court of Maine is unreported, a copy of which is reproduced as Appendix C.

JURISDICTION

The judgment of the Maine Supreme Judicial Court was rendered on December 31, 1991. This Court has jurisdiction to review the judgment of the Maine Supreme Judicial Court by writ of *certiorari* pursuant to 28 U.S.C. § 1257(a) (1991).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved in this litigation are the fifth and fourteenth amendments of the United States Constitution.

Fifth Amendment

No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Fourteenth Amendment, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Introduction

Like its counterparts in other states, Maine's legislature sought to provide its constituents top-dollar insurance benefits at rock bottom prices. In 1985, Maine imposed a rigid ceiling on workers' compensation insurance rates and rolled back existing rates to a level well below that ceiling. Other courts have repeatedly held that such

rate caps and rollbacks violate the just compensation clause of the fifth amendment and the due process clause of the fourteenth amendment unless they provide a "safety valve" by which insurers may have the opportunity to achieve a reasonable return on their investment.[1] However, when insurers in Maine sought similar protection, Maine's courts denied them a meaningful opportunity to rectify the damage caused by the state's rate suppression scheme.

Maine's Rate Freeze Law

Petitioners provide property/casualty insurance, including workers' compensation, for large, multi-state employers. Because these businesses require coverage wherever their employees might be located, petitioners have until recently offered coverage throughout the country, including Maine. Because workers' compensation insurance in Maine, as in most other states, is essentially compulsory, Maine has established a "residual market" through which all of its employers may purchase workers' compensation insurance even though their safety records are so bad or so uncertain that no insurer would provide insurance voluntarily. Since at least 1972, Maine has required all insurers licensed by that state to write workers' compensation insurance to accept "assigned risks" from the "residual market." Complaint ¶ 12, *AIU Ins. Co.* v. *Superintendent, Maine Bureau of Ins.*, No. CV-89-963 (Me. Super. Ct. January 2, 1991) ("*AIU Ins. Co.*"), App. D at 31a.

Petitioners belong to the National Council on Compensation Insurance ("NCCI"), a voluntary non-profit or-

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[1] *See, e.g., State Farm Mut. Auto. Ins. Co.* v. *State*, 590 A.2d 191 (N.J. 1991); *Medical Malpractice Joint Underwriting Ass'n* v. *Paradis*, 756 F. Supp. 669 (D.R.I. 1991); *Ohio Cas. Ins. Co.* v. *Insurance Dep't*, 585 A.2d 1160 (Pa. Commw. Ct. 1991); *Guaranty Nat'l Ins. Co.* v. *Gates*, 916 F.2d 508 (9th Cir. 1990); *Calfarm Ins. Co.* v. *Deukmejian*, 258 Cal. Rptr. 161 (1989).

ganization that provides statistical and research services to hundreds of insurance companies throughout the country. Between 1982 and 1985, NCCI was authorized to file rates in Maine on behalf of its members for both the "voluntary" and "residual" workers' compensation markets, but these rates were disapproved by the Insurance Superintendent, and the workers' compensation market as a whole lost money in each of those years.

In July 1985, Maine's legislature enacted chapter 372 of the Public Laws of 1985 (the "1985 Law"). Among other changes, the 1985 Law prohibited joint rate filings for the voluntary market, and it imposed an across-the-board retroactive reduction in all workers' compensation rates to a level at least 8% below the already inadequate 1984 rate. The new law froze rates at this artificially suppressed level until 1987, when insurers were allowed to seek rate increases, but even these increases were capped at 10% for 1987 and 1988.

In August 1985, Maine's Insurance Superintendent issued an interim order requiring all insurers to reduce their workers' compensation rates by 8%, retroactive to January 1, 1985. NCCI vainly sought to stay this interim order, and the Superintendent then commenced a proceeding to finalize his rollback order and to consider whether a deeper rate cut was warranted. He directed NCCI to participate in this proceeding, and three individual carriers as well as various labor and industry groups subsequently intervened. When this proceeding concluded in 1986, the Superintendent reissued his 8% rollback order, but he declined to roll back rates any further in the face of substantial evidence that the mandatory 8% reduction would itself preclude the industry "in the aggregate" from earning a "fair rate of return." *National Council on Compensation Ins.* v. *Superintendent, Maine Bureau of Ins.*, Nos. CV-85-459, *et al.*, slip op. at 8 (Me. Super. Ct. May 14, 1987) ("*NCCI, Super. Ct.*"), App. F at 56a-57a.

The NCCI Action

NCCI brought suit in Maine's Superior Court for a declaration that the 1985 Law amounted to an unconstitutional "confiscation" and an order enjoining the Superintendent of Insurance from enforcing the 1986 rate reduction order. Complaint ¶ 20 and Counts I-IV, *NCCI, Super. Ct.*, App. G at 96a-101a. Three individual insurers, Liberty Mutual, Peerless and The Home, separately challenged the 1985 Law and the 1986 rate reduction order as they applied to their individual businesses, and these actions, along with two other actions demanding a deeper rate cut, were consolidated with NCCI's challenge. *NCCI, Super. Ct.*, slip op. at 15-17, App. F at 62a-64a. In considering the various challenges, the trial court distinguished between NCCI's generalized constitutional attack and the "as applied" challenges of the three individual carriers.[2]

Concluding that "[p]roving a general, as opposed to a company specific, compensation [sic] case is extremely difficult if not impossible," the court rejected "the general industry challenge" to the 1985 Law. *NCCI, Super.*

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[2] The trial court framed the issues as follows:

> "1. *Confiscation generally:*
>
> Does the statute . . . **impose upon the Maine workers' compensation insurance industry generally** a confiscation without due process and just compensation in violation of Article I, Section 6A and Section 21 of the Maine Constitution and the Fifth and Fourteenth Amendments of the United States Constitution?
>
> * * *
>
> 2. *Confiscation specific (sic):*
>
> Does the statute as applied and interpreted by the Insurance Superintendent impose a confiscation without due process and just compensation **upon any or all of the individually named plaintiffs Liberty Mutual Insurance Company, Peerless Insurance Company or The Home Insurance Company**?"

National Council on Compensation Ins. v. *Superintendent, Maine Bureau of Ins.*, Nos. CV-85-459, *et al.*, slip op. at 17-19 (Me. Super. Ct. May 14, 1987), App. F at 64a-65a (emphasis added).

Ct., slip op. at 46, App. F at 87a-88a. The court then considered and rejected the three individual particularized challenges. In so doing, however, it warned that the Superintendent's orders were "potentially flawed" because they failed to provide those carriers that were losing money or failing to earn a reasonable rate of return an opportunity to withdraw from the state. *NCCI, Super. Ct.*, slip op. at 48, App. F at 89a.

NCCI and two of the individual carriers appealed to the Maine Supreme Judicial Court.[3] Ten days after that Court heard argument on the various challenges to the 1985 Law and the 1986 rate order, the legislature eliminated the rate ceiling on 1988 policies and restored the Superintendent's authority to approve "just and reasonable" rates in the future. 1987 Me. Laws, ch. 559, § 2363 (7).[4] On March 4, 1988, the Supreme Judicial Court dismissed all pending appeals as moot in light of the new law. *National Council on Compensation Ins.* v. *Superintendent of Ins.*, 538 A.2d 759, 764 (Me. 1988).[5]

The AIU Action

While NCCI's appeal was pending, this Court rejected the arguments of Maine and many other states and recognized that the just compensation clause's "self executing"

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[3] During the appeal's pendency, the Insurance Superintendent finally issued a new rate order for 1987, which allowed that year's rates to increase by the 10% maximum allowed under the 1985 Law.

[4] However, this new law precluded the Superintendent from considering rate shortfalls during the 1985-1987 period in evaluating the reasonableness of rates for subsequent years. 1987 Me. Laws, ch. 559, § 2363(7)(c).

[5] Following customary practice, the Supreme Judicial Court did not formally vacate the judgment of the trial court when it declared the appeal moot, nor did it remand the case with instructions to dismiss. There is no indication, however, that Maine's courts attach any significance to this procedural nicety. Most state courts do not. *See generally* Restatement (Second) of Judgments, § 28, comment a, Reporter's Note.

command requires states to compensate those whose property is taken "temporarily" before the intrusive state action is stopped. *First English Evangelical Lutheran Church* v. *Los Angeles County*, 482 U.S. 304, 315 (1987).[6] Petitioners thereupon instituted the present action in 1989 seeking compensation for the losses they had suffered on policies written under the now-repealed 1985 Law. Complaint, *AIU Ins. Co.* ¶¶ 33-34, App. D at 37a. They alleged that the losses they suffered because of inadequate rates during this three-year period had already exceeded $50 million, and would not be fully known for many years, until all claims on policies written during this period had been paid. Complaint, *AIU Ins. Co.* ¶ 30, App. D at 36a. They further alleged that their participation in Maine's workers' compensation market was not "voluntary" because the Superintendent had signalled a readiness to coerce insurers into staying in that market. Complaint, *AIU Ins. Co.* ¶ 29, App. D at 35a-36a.

The state asserted a variety of affirmative defenses, including *res judicata*, Answer, *AIU Ins. Co.* ¶ 40, and it moved to dismiss the complaint. It never alleged, however, that petitioners had been given notice of the NCCI litigation, let alone an opportunity to participate in that case.

The Superior Court rejected all of the state's procedural defenses, rejecting the defense of *res judicata*, or "claim preclusion," because a "just compensation claim [for damages] could not have been brought at the earlier proceeding." *AIU Ins. Co.*, slip op. at 5-6, App. C at 12a-13a. Nonetheless, even though it concluded that the 1985 Law may have unconstitutionally deprived petitioners of property without "substantive" due process, *id.* at 14, 22, App. C at 20a, 26a-27a, the Superior Court held

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[6] The State of Maine and many other states filed a brief *amicus curiae* in support of Los Angeles. *See* Brief of State of California, et al., *First English Evangelical Lutheran Church* v. *Los Angeles County*, 482 U.S. 304 (1987) (No. 85-1199).

that this deprivation did not amount to a compensable "taking." *Id.* at 22, App. C at 26a-27a.

Petitioners appealed from the trial court's peculiar construction of the due process clause, pointing out that if the legislatively suppressed rates were so inadequate as to be "confiscatory" and therefore to violate the due process clause, then a compensable "taking" must also have occurred. The state cross-appealed from the trial court's rejection of its procedural defenses, including its defense of claim preclusion resulting from the NCCI action.

In affirming the trial court, Maine's Supreme Judicial Court did not determine the merits of petitioners' constitutional claims, but concluded instead that these claims were barred by *res judicata*. *AIU Ins. Co.* v. *Superintendent, Maine Bureau of Ins.*, 600 A.2d 1115, 1118 (Me. 1991), App. B at 7a-8a. Although conceding that "an association cannot sue for damages on behalf of individual members unless the individuals themselves join as parties," *id.*, it nonetheless concluded that petitioners should have intervened to protect their individual damages claims. *Id.* Since petitioners had failed to join their claims for damages with NCCI's equitable claims, it held that petitioners were forever precluded from litigating those claims.[7]

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[7] Although the court believed that petitioners could have filed a claim for damages from the rate freeze as soon as a rate order issued under that freeze applied to their policies, the court suggested no way in which petitioners could have recovered any damages arising from the Superintendent's 1987 order, which was issued *after* the NCCI trial had ended. *AIU Ins. Co.* v. *Superintendent, Maine Bureau of Ins.*, 600 A.2d 1115, 1117-1118 (Me. 1991), App. B at 7a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS FLATLY INCONSISTENT WITH *MARTIN* v. *WILKS*, 490 U.S. 755 (1989)

If the decision below had been rendered by a federal court, it would be subject to summary reversal under *Martin* v. *Wilks*, 490 U.S. 755 (1989). In *Wilks* this Court held that white firefighters could not be precluded from challenging a city's hiring and promotion practices as reverse discrimination even though these practices were taken pursuant to a consent decree, and the plaintiffs had been aware of the proceedings leading to the decree but had failed to intervene. In so ruling this Court invoked a

> "[P]rinciple of general application in anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry* v. *Lee*, 311 U.S. 32, 40 (1940). *See, e.g., Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 327, n.7 (1979). *See, e.g., Blonder-Tongue Laboratories, Inc.* v. *University Foundation*, 402 U.S. 313, 328-329 (1971); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969).

490 U.S. at 761-762.

In holding that the petitioners must have intervened in the NCCI litigation in order to protect their separate takings claims, Maine's Supreme Judicial Court may have assumed that *Wilks* turned only upon an interpretation of the Federal Rules of Civil Procedure.[8] Although *Wilks* did involve "an interpretation of the relevant Rules," 490 U.S. at 767, its holding was clearly grounded in the due process clause. Each of the authorities that the Court relied upon in the passage from *Wilks* quoted above speaks in due process terms. Indeed, *Hansberry* v.

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[8] Although petitioners' appellate brief relied upon *Wilks*, the court ignored it, so its rationale must remain obscure.

Lee, 311 U.S. 32 (1940), whose language is directly quoted in the excerpt from *Wilks* cited above, reversed a state supreme court's application of *res judicata* as a denial of due process. 311 U.S. at 119-120. Although each of the other cases arose in federal courts, this Court's opinions in each of these cases to which the *Wilks* opinion refers are all expressly couched in due process terms. *See Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 327 n.7 (1979) ("[i]t is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy . . ."); *Blonder-Tongue Laboratories, Inc.* v. *University of Ill. Found.*, 402 U.S. 313, 329 (1971) ("[d]ue process forbids estopping [a litigant who never appeared in prior action] . . ."); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969) ("consistent constitutional rule"). If the Maine Supreme Judicial Court's decision is allowed to stand, it will call into question the authority of this Court's consistent due process precedents from *Hansberry* to the present day.[9]

A. The Decision Below Cannot Be Squared With the Due Process Principles Reiterated in *Wilks*

By imposing a duty on petitioners to intervene, the court below flouted the general due process rule reiterated in *Wilks*:

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[9] Although § 108 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), may have been designed to limit *Wilks*, this provision is explicitly limited to employment discrimination cases and has no relevance to petitioners' claims. There is therefore no occasion to consider either the scope of the 1991 Act or its application to actions commenced before November 1991. *Compare Stender* v. *Lucky Stores*, 780 F. Supp. 1302 (N.D. Cal. 1992) (Act applies to pending case) with *Mitchell* v. *Secretary of Commerce*, 1992 Westlaw 10509 (D.D.C. 1992) (Act does not apply). Moreover, even in the employment discrimination context, the 1991 Act precludes subsequent attacks on consent decrees only by those who had "actual notice of the proposed judgment" or "whose interests were adequately represented by another person who had previously challenged the judgment . . . ." 105 Stat. 1071. Neither of these conditions was satisfied in the present case.

> The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger. . . . Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights.

490 U.S. at 763, *quoting Chase National Bank* v. *Norwalk*, 291 U.S. 431, 441 (1934). As *Wilks* recognized, there are certain limited circumstances in which this general rule does not apply, such as where the non-party controls the prior litigation or at least where its interests were adequately represented by another party and the non-party has consented to that representation. 490 U.S. at 762 n.2, *citing Hansberry*, 311 U.S. at 41-42, and *Montana* v. *United States*, 440 U.S. 147, 154-155 (1979). Neither of these exceptions applies in the present case. There is no basis whatsoever for concluding that petitioners were even aware of the pendency of the NCCI litigation, much less that they controlled that litigation.[10] It is equally clear that NCCI could not have represented petitioners' individual interests at all, let alone represented them "adequately." Following this Court's ruling in *Warth* v. *Seldin*, 422 U.S. 490 (1979), the court below conceded that "an association cannot sue for damages on behalf of its members . . . ." *AIU Ins. Co.*, 600 A.2d at 1117-1118, App. B at 7a. The petitioners in this case were just like the individual homebuilders in *Warth*. There, a homebuilders association challenged a zoning ordinance as violating its members' rights to due process and just compensation, but individual builders had not joined that challenge. Although this Court recognized that the association might have standing to seek prospective relief on behalf of its members, it could not seek damages on behalf of those members because "whatever injury may have been suffered is peculiar to the individual member, and both the fact and extent of injury would require indi-

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[10] *None* of the elements upon which this Court found control in *Montana* v. *United States*, 440 U.S. 147, 155 (1979), is alleged to be present in this case.

vidualized proof." 422 U.S. at 515-16.[11] *See also Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 342-45 (1977); *cf. Cooper* v. *Federal Reserve Bank of Richmond*, 467 U.S. 868 (1984).

Moreover, NCCI never purported to represent any insurer's individualized claims for damages. On the contrary, its challenge was presented as a "general" challenge to the 1985 Law, made on an "industry-wide" rather than a "company-specific" basis, *NCCI, Super. Ct.*, slip op. at 45-47, App. F at 87a. Although the court appeared to recognize that "skillful, efficient or lucky" carriers were entitled to earn an adequate rate of return under the regulated rates, *id.* at 46, App. F at 87a, it made no determination regarding the particular experience of petitioners or any of the more than 100 other workers' compensation insurers who did not intervene in that proceeding. NCCI's attack on the 1985 Law was therefore a facial attack on its validity, along much the same lines as the California insurers' attack on that state's rate rollback was a facial attack on that statute. *See Calfarm Ins. Co.* v. *Deukmejian*, 48 Cal. 3d 805, 258 Cal. Rptr. 161, 771 P.2d 1247 (1989). In attacking Maine's similar across-the-board rate rollback, which pre-

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[11] That NCCI asserted that its members' overall damages during the first year of the rollback would exceed $100 million, 600 A.2d at 1117 n.1, App. B at 6a, does not mean that it could have established the damages of any individual member. Moreover, petitioners' losses under the rates finally approved in 1987 could not have been litigated by *any* party in the original action, since these rates were established only *after* the trial ended.

In an analogous case, New York's Court of Appeals determined that the damages claims of insurers that challenged the constitutionality of a statute that diverted principal and earnings from a state-managed industry security fund was premature until such time as the plaintiffs had actually suffered monetary losses. *American Ins. Ass'n* v. *Chu*, 64 N.Y.2d 379, 476 N.E.2d 637, 487 N.Y.S.2d 311, *appeal dismissed, cert. denied*, 474 U.S. 803 (1985). In that case, the New York court rejected plaintiffs' argument that their losses were "certain" and "definite." *Id.*, 64 N.Y.2d at 385-386, 476 N.E.2d at 637-639, 487 N.Y.S.2d at 311-313.

cluded the Superintendent from granting any administrative relief, it was neither necessary nor feasible to adduce evidence regarding the impact of the rollback on each individual insurer writing workers' compensation insurance in the state. A prior decision upholding a regulation as facially constitutional does not foreclose subsequent litigation of whether the regulation is constitutional as applied. *Keystone Bituminous Coal Ass'n* v. *DeBendictis*, 480 U.S. 470, 494 (1987); *McNulty* v. *Town of Indialantic*, 727 F. Supp. 604, 606 (M.D. Fla. 1989).

The lower court's conclusion that petitioners were in "privity" with NCCI is as baseless as the Illinois Supreme Court's similar conclusion in *Hansberry*. Neither can survive serious due process scrutiny. As in *Hansberry*, in which the state courts misused *res judicata* to extinguish a fundamental civil right, the due process violation occasioned by the Maine court's ruling in this case particularly requires correction. The substantive right that will be lost is not simply a "property" right created by state law. *Cf. Board of Regents* v. *Roth*, 408 U.S. 564 (1972). Rather, petitioners' right to compensation flows from the "self-executing" terms of the fifth amendment itself. *See First English*, 482 U.S. at 315. By creating artificial, indefensible barriers to those who seek to enforce their right to compensation, the Maine court would thwart this Court's rulings in both *First English* and *Wilks*.

B. The Maine View of *Res Judicata* That Imposes a Duty Upon Members of Associations To Intervene Will Inhibit Association Representation

In *First English*, Maine joined other states in an attempt to limit the constitutional remedy for regulatory takings to equitable relief. Five years later Maine's courts have adopted a rule that, as a practical matter, significantly restricts the availability of equitable relief. If left standing, the Maine court's decision will do more damage than merely allowing the losses attributable to

that state's concededly unreasonable rate freeze to remain uncorrected. It will seriously impede the abilities of many associations to represent their members' interests in state courts.

Under the Maine court's version of *res judicata*, associations like the property owners group in *Pennell* v. *City of San Jose*, 485 U.S. 1 (1988) or the coal producers in *Keystone*, may no longer seek equitable relief against violations of their members' rights without running the risk of compromising their members' individual rights to be made whole for violations that have already caused loss. Nor may individuals or firms rely on their associations to spread the cost of challenging state laws or rules on constitutional grounds, because each member must now intervene to safeguard his or her individual interests. Because the Maine court's version of *res judicata* applies to any member of any association, it will inhibit the functioning of all associations, whether they have hundreds of members, like NCCI, or millions of members, like the American Association of Retired Persons. Members of large organizations, like the AARP, the American Hospital Association or the American Medical Association, expect these associations to promote their interests in court, if necessary, without each of them having to hire a lawyer to monitor those association's activities, much less to intervene in these proceedings with their thousands or possibly millions of individual claims. Placing such a burden on individual members will discourage association membership and hobble these individuals' ability to secure protection against governmental excesses.

By ignoring this Court's due process rulings, the decision below has raised serious questions about whether state court procedures adequately implement the fifth amendment's "self executing" commands. Unless corrected, associations would be well advised to file *all* further takings challenges in federal court, where their members have no "duty to intervene," or (where damages are

not constitutionally available in federal court because of the eleventh amendment) to file parallel state and federal court actions.

If nothing else, the ruling below threatens to make the federal courts the exclusive forum for litigating takings claims, at least for association plaintiffs. Because the adverse impacts of its manifestly incorrect ruling transcend the hundreds of millions of dollars in dispute in this case, the judgment of Maine's Supreme Judicial Court requires this Court's review and correction.

CONCLUSION

For the foregoing reasons, this petition for writ of *certiorari* should be granted.

Respectfully submitted,

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APPENDIX A

STATE OF MAINE
SUPREME JUDICIAL COURT
Sitting as the Law Court

Law Court Docket No. CUM 91-71

AIU INSURANCE COMPANY, *et al.*

v.

SUPERINTENDENT OF INSURANCE

MANDATE

[Received Jan. 14, 1992]

The above-captioned cause having been brought before this Court, sitting as the Law Court, from the Superior Court in the County of Cumberland; and it having been heard and maturely considered:

IT IS ORDERED that the Clerk of the Law Court enter upon the Law Court Docket and certify to the Clerk of the Superior Court in the County of Cumberland the following mandate therein:

Judgment affirmed.

Dated: December 30, 1991

FOR THE COURT:

/s/ David Roberts
Associate Justice

APPENDIX B

MAINE SUPREME JUDICIAL COURT

Reporter of Decisions
Decision No. 6049
Law Docket No. CUM-91-71

AIU INSURANCE COMPANY, *et al.*

v.

SUPERINTENDENT OF INSURANCE

Argued June 20, 1991

Decided December 31, 1991

Before McKUSICK, C.J., and ROBERTS, WATHEN, GLASSMAN, CLIFFORD, COLLINS and BRODY*, JJ.

ROBERTS, J.

AIU Insurance Company, American Fidelity Company, American Home Assurance Company, Birmingham Fire Insurance Company of Pennsylvania, Commerce and Industry Company, Insurance Company of the State of Pennsylvania, National Union Fire Insurance Company of Pittsburgh, PA, New Hampshire Indemnity Company, Inc. and New Hampshire Insurance Company (the In-

* Brody, J., sat at oral argument and participated in the initial conference but resigned before this opinion was adopted.

surers) appeal a summary judgment of the Superior Court (Cumberland County, *Perkins, J.*) in favor of the Superintendent of the Bureau of Insurance in an action to recover damages resulting from an allegedly confiscatory statutory rate rollback. Because we agree with the Superintendent's contention that the Insurers' action is barred by *res judicata*, we affirm the judgment of the Superior Court.

I.

The Insurers in the instant case are a group of companies that for many years wrote workers' compensation insurance in Maine. Throughout this period they were members of the National Council on Compensation Insurance (NCCI), a rating organization licensed to file rate applications on their behalf pursuant to 24-A M.R.S.A. § 2310 (1990). By the early to mid-1980's there was something of a crisis in the workers' compensation insurance industry, with consumers claiming that rates were unjustifiably high and companies claiming they were unable to earn a fair rate of return on the state approved rates they were charging. *See National Council on Compensation Ins. v. Superintendent of Ins.*, 481 A.2d 775 (Me. 1984) (*NCCI I*). In response to these problems, the Legislature passed the Workers' Compensation System Competitive Rating Act, P.L. 1985, ch. 7372 (hereinafter the 1985 Act). This Act mandated significant reductions in both benefits and premiums as of August 1, 1985. It remained in effect until November of 1987, when it was repealed by the Legislature.

One immediate effect of the 1985 Act was to enforce a reduction of all workers' compensation rates then in effect by at least 8% from the rates that had been in effect on January 1, 1985. This rate rollback was to run through the end of 1986, after which insurers were forbidden to raise their rates by more than 10% in any given year. Thereafter, the Superintendent issued interim and final orders reducing the rates of all workers' compensation carriers by the minimum 8%. NCCI sought

injunctive relief, claiming that its members would lose approximately one hundred million dollars "[i]f Defendant's Order to reduce rates by 8% is made effective for the one year period beginning August 1, 1985." NCCI argued that if the act were to take effect, the return on equity would thus be "confiscatory" in the constitutional sense.

The 1985 Act also required the Superintendent to adopt a plan governing the assignment of residual market policies to insurance companies participating in the voluntary market. The residual market consisted of employers that, for reasons such as non-payment of premiums or unacceptably high accident rate, would normally not be within the group to whom the insurers would offer their product. Under the plan approved by the Superintendent, carriers with over 1% of the market in Maine acted as servicing carriers for these residual market policies and were responsible for administering the policies and claims arising under them in return for a percentage of the premiums. The plan also required all carriers to share in losses generated by the residual market policies according to a formula adopted by the Superintendent.

NCCI challenged this order as well and the Superior Court resolved the challenges in an opinion and order dated May 14, 1987. That opinion upheld the Act's constitutionality against NCCI's "general constitutional challenge", and denied injunctive relief. NCCI then appealed to this Court. Ten days after oral argument, however, the Legislature enacted P.L. 1987, chs. 559-560, which repealed the 1985 Act and substantially revised both the rate setting and benefit provisions of the Workers' Compensation Act. After further briefing and argument on the issue of mootness, we dismissed NCCI's appeal as moot on March 4, 1988. *National Council on Compensation Ins. v. Superintendent of Ins.*, 538 A.2d 759 (Me. 1988) (*NCCI 2*). In the wake of the Superior Court's ruling, the Insurers had petitioned to withdraw from the

workers' compensation market in Maine. The Insurers' petitions were granted prompt approval and they ultimately withdrew on December 31, 1987.

On July 26, 1989, the Insurers initiated the present action against the Superintendent in his official capacity, seeking damages under the federal and state constitutions on the ground that the statutory scheme imposed by the Legislature and enforced by the Superintendent was "confiscatory" and amounted to a "taking of . . . property without payment of just compensation." After filing his answer, the Superintendent moved to dismiss the complaint or, in the alternative, for summary judgment on a variety of grounds including sovereign immunity, res judicata, statute of limitations and equitable estoppel as well as failure to state a claim on which relief could be granted. On January 2, 1991, the Superior Court entered judgment against the Insurers on the ground that they had failed to demonstrate a "taking under the 'takings clause' of the Fifth and Fourteenth Amendments of the United States Constitution and Article 1, section 6-A of the Maine Constitution." The Insurers filed a timely notice of appeal and the Superintendent cross-appealed, challenging adverse rulings contained in the decision and order.

II.

In the instant case it is uncontested that the Insurers are in privity with the National Council on Compensation Insurance with respect to the litigation in *NCCI 2*. Nevertheless, the Insurers make essentially the same argument for damages as that made in *NCCI 2*. The only difference between the two cases is the type of relief requested. In *NCCI 2* the Insurers sought injunctive and declaratory relief. In this case the Insurers request damages for the period of time during which the rates had been rolled back by the contested statute. In response to the Superintendent's contention that this case is barred

by the doctrine of *res judicata*, the Insurers argue that their claim could not have been litigated in the prior proceeding because "[w]hen *NCCI 2* was originally filed in 1985, appellants had not yet suffered any damages."

A party must assert all claims arising from a cause of action in a single claim. In *Currier v. Cyr*, 570 A.2d 1205 (Me. 1990), we held that:

> the doctrine of res judicata bars the relitigation in a present action of all issues that were tried, *or may have been tried*, in a prior action if: (1) the same parties or their privies were involved in both actions; (2) a valid final judgment was entered in the prior action; (3) the matters present for decision now were, or might have been, litigated in the prior action.

Id. at 1208 (emphasis added). In this case, the same parties were involved in both actions and a final judgment was entered in the prior action. Assuming, without deciding, that a cause of action existed, the only issue remaining is whether the damages currently at issue existed at the time of *NCCI 2* and "might have been" litigated at that time. *Id.*

It is in the nature of risk pooling that it is not possible to predict whether a particular insurance policy and premium will produce a return for the insurer. Premiums are established on the basis of actuarial forecasts that predict a net return on all policies issued by a particular insurer or group of insurers. If, as the Insurers allege, their premiums were actuarially determined to be confiscatory from the date of the issuance of their policies, they were damaged at that moment.[1] Contrary to

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[1] Examination of the history of this litigation indicates that the insurers were sufficiently aware of the potential for damages to assert in their original complaint in 1985 that they would lose somewhere between $99,000,000 and $107,000,000 in the first year of the rate rollback.

the opinion of the Superior Court, damages based on allegedly confiscatory rates, if recoverable at all, would not depend on the Insurers' paying out claims under policies issued at the reduced rate. The consolidated complaints of *NCCI 2* did not go to trial in the Superior Court until more than one year after the Insurers began writing policies under the contested rate schedule. The Insurers, having issued numerous policies at the lower rates by that time, had allegedly sustained damages prior to trial in that action. Their failure to seek damages in *NCCI 2* bars them from raising such a claim in the instant case.

The Insurers also assert that, although an association like NCCI may sue for injunctive or declaratory relief, it has no authority to bring damage claims on behalf of individual members unless the individuals themselves join as parties. Though this argument is partially correct, we find that it is unavailing in this case. The Supreme Court did hold in *Warth v. Seldin*, 422 U.S. 490, 515-16 (1975), that an association cannot sue for damages on behalf of its members unless the injured parties are made actual parties to the suit. Nevertheless, the Insurers make no showing that they could not have intervened in the case or that they were in any way prevented from asserting their rights to monetary damages at the time.

Finally, the Insurers must rely on their participation in *NCCI 2* to avoid finding their claims barred by the doctrine of administrative res judicata. Had the Insurers permitted the administrative proceedings to become final without seeking judicial review pursuant to 5 M.R.S.A. § 11002 (1989), they would not have been permitted to then seek an award of damages based on allegedly confiscatory rates. *See Maines v. Secretary of State*, 493 A.2d 326 (Me.), *cert. denied*, 474 U.S. 947 (1985). Although we do not address the ground on which the Superior Court granted a summary judgment in favor of the Superintendent, we affirm that judgment on the

ground of res judicata, which was raised and fully litigated in the trial court.

The entry is:

Judgment affirmed.

McKusick, C.J., Wathen, Glassman, Clifford and Collins concurring.

APPENDIX C

STATE OF MAINE
CUMBERLAND, SS.

SUPERIOR COURT
Civil Division

Docket No. CV-89-963

AIU INSURANCE COMPANY, *et al.*,
Plaintiffs

v.

SUPERINTENDENT, MAINE BUREAU OF INSURANCE,
Defendant

DECISION AND ORDER

Pending is a motion to dismiss against a complaint seeking monetary damages from the Superintendent of Insurance. The plaintiffs, ten insurance companies that provided workers' compensation coverage during 1985 to the end of 1987, seek "just compensation" under the takings clause of art. I, § 21 of the Maine Constitution and the 5th and 14th Amendments of the United States Constitution. The plaintiffs' allege they have incurred lost earnings exceeding Fifty Million Dollars ($50,000,000.00) from "confiscatory" rates established by the Superintendent of Insurance. The court treats the pending motion as a motion for summary judgment because matters outside the pleadings have been entered into the record. M.R.Civ. P. 12(b).

BACKGROUND

The present suit arises from actions undertaken by the Superintendent under the authority of the Workers' Compensation Act of 1985—"An Act to Improve the Workers'

Compensation System and Reform the Rate-Making Process", P.L. 1985, ch. 372 [hereinafter "the Act"]. The Act was a major reform effort which sought to reduce costs by cutting benefits to injured workers and by restructuring the ratemaking process.

In regard to insurance rates chargeable by insurance companies operating in the State for both the "voluntary" and "residual" markets,[1] the Act created a transition period from August 1, 1985 to December 31, 1988. During this period the system of prior approval of rates by the Superintendent would remain in effect and additional authority was given to the Superintendent to set rates, within statutory maximum levels. From August 1, 1985 to December 31, 1986, the Act required the Superintendent to lower rates by at least eight percent (8%) from those rates previously in effect. The eight percent (8%) reduction was to "reflect the rate effect of [the benefit reductions] and the consideration of investment income . . . not previously considered in establishing rates." 24-A M.R.S.A. § 2355(1) (Supp. 1986). In calendar years 1987 and 1988, the rates could be increased by a maximum of ten percent (10%) per year.

Following the effective date of the Act, and after no insurer submitted a rate filing under the Act, the Superintendent convened a proceeding to implement the new rate setting mandates. The National Council of Compensation Insurers (NCCI), an association whose members included the plaintiffs to the present action, was designated as a party to represent the interests of its mem-

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[1] The voluntary market is comprised of employers the insurance carriers are willing to insure without regard to any legal requirement that they do so. The residual market is composed of employers who are unable to obtain insurance in the voluntary market for various reasons, including a demonstrated accident frequency problem, a measurable adverse loss ratio over a period of years, or a demonstrated attitude of noncompliance with safety requirements.

ber insurance carriers.[2] The Superintendent, thereafter, awarded the maximum rates allowable under the Act (that is, rates which were eight percent (8%) lower than the previous rates).

NCCI challenged the rate order and the constitutionality of the 1985 Act through a M.R. Civ. P. 80C proceeding and declaratory judgment in Superior Court. *N.C.C.I., et al. v. Supt. of Insurance*, (Sup. Ct. Ken. Cty. 85-459). On May 14, 1987, the court upheld the constitutionality of the Act and the rates established by the Superintendent. Five months after the Superior Court decision, the ten plaintiffs in the present action filed withdrawal plans with the Superintendent to discontinue service within the State of Maine. The Superintendent approved the plans and the carriers did in fact withdraw from serving the Maine market on December 31, 1987. Although the plaintiffs have withdrawn from serving the Maine market, they allege that they continue to experience "losses" from policies entered into during the 1985 to 1987 period.

Following the Superior Court decision, NCCI appealed the decision to the Law Court. In 1987, after the appeal had been argued but before a final decision had been rendered, the 1985 Act was repealed by the Legislature. P.L. 1987, ch. 559-60. The Law Court, thereafter, dismissed the appeal as moot because all relief (injunctive and declaratory) requested by the action had been prospective and the legislative repeal of the 1985 Act effectively granted the relief sought by the plaintiffs. *N.C.C.I. v. Supt. of Insurance*, 538 A.2d 759 (Me. 1988) (hereinafter *NCCI 2*). The plaintiffs to the present action brought suit against the Superintendent for "just compensation" under the takings clause sixteen months after *NCCI 2* was decided.

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[2] In addition, the Chamber of Commerce, the AFL-CIO and the State's Public Advocate intervened on behalf of ratepayers.

DISCUSSION

The plaintiffs raise a novel issue in this action. The court is unaware of any decision in any jurisdiction which has held that "just compensation" under the takings clause must be awarded for losses incurred by a regulated industry from "confiscatory rates" imposed by a public authority. Before reaching the merits of that issue, however, the defendant has raised a number of preliminary grounds for dismissing the action which must be resolved.

Preliminary Issues

The defendant contends that the present action is barred by the doctrine of sovereign immunity and/or the Maine Tort Claims Act, 14 M.R.S.A. § 8104-B (Supp. 1990). This contention, however, misperceives the nature of an action seeking just compensation under the "takings clause" of the 5th Amendment, as applied to the states through the 14th Amendment. Just compensation under the takings clause is a constitutionally based "self-executing" remedy that is not dependent upon remedial devices provided under statutory enactments or the common law. *Jacobs v. United States*, 190 U.S. 13, 16 (1933) (quoted in *First English Lutheran Church v. Los Angeles County*, 482 U.S. 304, 315 (1987) [hereinafter *First English*]). "[I]t is the Constitution that dictates the remedy for interference with property rights amounting to a taking." *First English*, 482 U.S. at 316 n.9. Neither the doctrine of sovereign immunity or the Maine Tort Claims Act, therefore, precludes the present action. *See Foss v. Maine Turnpike Authority*, 309 A.2d 339, 344 (Me. 1973).

The defendant further argues that the plaintiffs' action is barred by the doctrine of claim preclusion because a claim for monetary compensation had not been raised in *NCCI 2*. Although the court agrees that the present plaintiffs were in privity with NCCI in *NCCI 2*, and, therefore, that the rules of claim preclusion apply to them

in the present action, the court determines that the present action is not barred under those rules.

Restatement (Second) Judgments § 19 provides that:

> A valid and final personal judgment rendered in favor of the defendant bars another action by the plaintiff on the same claim.

The dimension of a "claim" for claim preclusion purposes "includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." *Restatement (Second) Judgments* § 24. Although the present suit for just compensation arises out of the same transaction as the suit in *NCCI 2*, the claim for just compensation could not have been brought at the earlier proceeding because the losses complained of by the plaintiffs now did not actually arise until after *NCCI 2* had been decided.[3] If the plaintiffs had sought a judgment for just compensation in *NCCI 2*, the claim would have been premature and subject to dismissal. As the court finds that a just compensation claim could not have been raised in the earlier proceeding, the court concludes that the claim for just compensation is not barred under the doctrine of claim preclusion. *Restatement (Second) Judgments* § 20(2).

The defendant also contends that the plaintiffs are equitably estopped from waiting until 1989 to pursue the present claim. This argument has no merit. The court finds that the defendant has not presented "clear and convincing" proof that there was actual fraud, fault or negligence equivalent to fraud on the part of the plaintiffs by waiting until 1989 to bring suit or that the delay somehow caused the defendant to change position to the

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[3] The alleged losses occurred only after the plaintiffs began paying out insurance claims under policies the plaintiffs had entered into during the time the "8%" rates were in effect.

detriment of the State. *Jack v. Dept. of Human Services*, 556 A.2d 1093, 1095 (Me. 1989).

The defendant further argues that insurance carriers are not constitutionally protected from the imposition of confiscatory rates because they are not public utilities. Insurance carriers are so protected. "While it is not constitutionally required to fix rates which will guarantee a profit to all insurers, it may not constitutionally fix rates which are so low that if the insurers engage in business they may do so only at a loss. The insurers are not required to either submit to confiscatory rates or go out of business." *Aetna Cas. & Surety Co. v. Comm. of Insurance*, 263 N.E.2d 698, 703 (Mass. 1970). *See also, National Council of Compensation Insurers v. Superintendent of Insurance*, 481 A.2d 775, 781 (Me. 1984).

Finally, the defendant contends that any damages arising from a cause of action which accrued before July 26, 1986 are time barred under the three year statute of limitations provided under 14 M.R.S.A. § 868 (1980). The three year limitation period, however, does not apply to regulatory takings. It applies only to takings which occur as a result of formal condemnation proceedings under the State's powers of eminent domain. *Lerman v. City of Portland*, 675 F. Supp. 11, 15 (D.Me. 1987). The six year limitation period under 14 M.R.S.A. § 752 applies to the present claim. As the plaintiffs have clearly brought suit within that time period, the claim is not barred by the statute of limitations.

Just Compensation Under the Takings Clause

A. *Constitutional Basis for Prohibition Against Confiscatory Rates*

The plaintiffs contend that the "grossly inadequate" and "confiscatory" rates imposed by the Superintendent of Insurance under § 2355 of the Act allegedly resulted in substantial monetary losses and were, therefore, a

"taking" requiring "just compensation" under the takings clause of the 5th and 14th Amendments to the United States Constitution and art. I, § 21 of the Maine Constitution.

If the court finds that a "taking" has occurred, the plaintiffs may be awarded "just compensation" regardless of whether the taking was permanent or temporary. *First English*, 482 U.S. at 321 ("where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.").

The precise issue now facing the court, therefore, is whether the alleged "confiscatory rates" constitute a "taking."

There is no simple definition of the term "confiscatory rate." The Law Court has broadly defined the term as a rate that denies a regulated firm "the opportunity to realize a reasonable return on investment . . . and that the inadequate return results directly from the rate approval process and not from other causes." *NCCI 2*, 481 A.2d 775, 781 (Me. 1984). Generally, confiscatory rates are rates that are unreasonable, *F.P.C. v. Natural Gas Pipeline*, 315 U.S. 575, 586 (1942) [hereinafter *Natural Gas Pipeline*], and insufficient to "ensure the financial integrity of the enterprise." *F.P.C. v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944) [hereinafter *Hope Natural Gas*]. Although, price regulation "may, consistently with the Constitution, limit stringently the return recovered on investment . . . the 'power to regulate is not a power to destroy' . . . [and] is unconstitutional . . . if arbitrary, discriminatory, or demonstrable irrelevant to the policy the legislature is free to adopt . . . ." *Permian Basin Area Rate Cases*, 390 U.S. 747, 769-70 (1968) [hereinafter *Permian Basin*] (quoting *Stone v. Farmers' Loan & Trust Co.*, 116 U.S. 307, 331 (1886) and *Nebbia v. New York*, 291 U.S. 502, 539 (1934)).

The lack of clarity surrounding the term "confiscatory rate" stems in part from the ambiguity concerning the constitutional foundation on which the prohibition against such rates is based.[4] Two constitutional commands—the "takings clause" and the due process "deprivation of property" clause—are the bases for the requirement.

The United States Supreme Court has recently stated that constitutional challenges to the adequacy of rates raises a "set of questions under the Takings Clause of the Fifth Amendment." *Duquesne Light Co. v. Barasch*, —— U.S. ——, 102 L.Ed.2d 646, 657 (1989). *See also*, *F.C.C. v. Florida Power Corp.*, 480 U.S. 245, 253 (1987) ("So long as rates set are not confiscatory the Fifth Amendment does not bar their implementation.") Despite its reference to the takings clause, the three cases the *Duquesne* Court relied upon as authority for basing the adequacy of rates on the takings clause limited the exercise of regulatory powers in the rate setting context solely upon substantive due process grounds.[5] The *Duquesne* Court, furthermore, simply stated that the "guiding principle [in utility rate regulation] has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory;" it did not define "confiscatory rates" as exclusively meaning a "taking." *Duquesne Light Co. v. Barasch*, 102 L.Ed.2d at 657. Rather, it opaquely stated that "[i]f the rate does not afford *sufficient compensation*, the State has taken the use

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[4] The term "confiscatory rate" "has done little to promote analytic clarity, particularly since the original source of these constraints would appear to have been the Due Process Clause rather than the Takings Clause." R. Goldsmith, *Utility Rates and "Takings"*, 10 Energy Law Journal 241, 245 (1989).

[5] The three cases were *Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U.S. 578, 597 (1896), *F.P.C. v. Natural Gas Pipeline*, 315 U.S. 575, 585 (1942), and *F.P.C. v. Texaco, Inc.*, 417 U.S. 380, 391-92 (1974). *See* R. Goldsmith, *Utility Rates and "Takings"*, 10 Energy Law Journal at 261 n.166.

of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments." *Id.* at 657 (emphasis added). The Court did not address whether *any* "unfair" or "unjust" rate would "not afford sufficient compensation" and, thereby, constitute a taking requiring just compensation. In *Duquesne*, therefore, the Court's formulation does not preclude the term "confiscatory rate" from implicating *only* the due process concept of "deprivation of property" in an appropriate factual setting, rather than *always* implicating the takings clause.[6]

The seminal Supreme Court cases which have guided the constitutional limits on rate-setting for the past half century, furthermore, are based primarily upon a form of substantive due process rather than the "takings" clause. *See e.g., The Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); *F.P.C. v. Hope Natural Gas*, 320 U.S. 591 (1944); and *F.P.C. v. Natural Gas Pipeline*, 315 U.S. 575 (1942).[7] Although the takings clause was the apparent basis for striking down numerous "confiscatory rates" in the early 20th century, R. Pierce, Jr., *Public Utility Regulatory Takings: Should the Judiciary Attempt to Police the Political Institutions*, 77 Georgetown L. Rev.

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[6] That "confiscatory rates" are prevented under due process "deprivation of property" clause as well as the takings clause is hinted at by the Maine Law Court, in *Nat. Council of Compensation Insurance v. Supt. of Ins.*, 481 A.2d 775, 781 (Me. 1984). The Law Court referred to the challenged rates as one that might "deprive[] its members of property without compensation in violation of art. I, § 6-A of the Maine Constitution and amendments V and XIV of the United States Constitution." Art. I, § 6-A, however, contains only the State's due process clause. The takings clause is contained in art. I, § 21. *See also, City of Bangor v. P.U.C.*, 156 Me. 455, 458 (1960) ("rates must not be confiscatory in violation of the due process clauses of the Constitution of the United States and of the State of Maine.").

[7] In *Pennell v. City of San Jose*, 485 U.S. 1 (1988), the Supreme Court explicitly recognized that the constitutional limits expressed in *Hope* and *Permian Basin* were founded upon the Due Process Clause. *Id.* at 12-14.

2031, 2031 (1989),[8] this approach was repudiated in *Natural Gas Pipeline*. In *Natural Gas Pipeline*, the Court reversed the requirement first established in *Symth v. Ames*, see note eight *supra*, that "fair value" rate-setting was mandatory under the takings clause of the 5th Amendment. In so doing, three concurring justices noted that "fair value" ratemaking was a "fallacious theory . . . deriv[ing] from principles of eminent domain . . . [which] . . . have no place in rate regulation." *Id.* at 602-03 (Black, Douglas and Murphy concurring). The majority in *Hope* further noted that:

> Ratemaking is indeed but one species of price fixing . . . . The fixing of prices, like other applications of the police power, may reduce the value of the property which is being regulated. But the fact that the value is reduced does not mean that the regulation is invalid.

Hope Natural Gas, 320 U.S. at 601 (citations omitted) (comparing utility ratesetting to price fixing law under *Nebbia v. New York*, 291 U.S. 502 (1934). *See*, R. Goldsmith, *Utility Rates and "Takings"*, 10 Energy Law Journal at 248 (1989) (*Hope Natural Gas* and *Natural Gas Pipeline* "interred" the takings analogy in the law of ratemaking).

Although *Duquesne* appears to have resurrected the law of takings in the ratesetting context, R. Goldsmith, *Utility Rates and "Takings"*, 10 Energy Law Journal

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[8] In the earliest Supreme Court case which explored the constitutional limits of ratesetting under State police powers, *Smyth v. Ames*, 169 U.S. 466 (1898), the Supreme Court held that a regulated enterprise was entitled to a "fair return on the fair value of the property being used by it for the convenience of the public." *Id.* at 546-47. Any rates that fell below this rate were "confiscatory" and, therefore, unconstitutional. The holding was based upon an "analogy" with the law of eminent domain under the 5th Amendment. *Id.*

at 261, it did not overrule the earlier substantive due process based cases nor did the Court explicitly hold that the imposition of confiscatory rates would always require the State to pay just compensation under the takings clause. Until the United States Supreme Court conclusively establishes that the takings clause is *always* implicated when a confiscatory rate is found, courts must examine challenged rates on the basis of both the due process clause and the takings clause.[9] *Cf. Pennell v. San Jose*, 485 U.S. 1, 8-15 (1988) (challenge to rent control ordinance examined under the takings clause, due process clause and the equal protection clause); *Nollan v. Calif. Coastal Comm'n*, 483 U.S. 825, 834 n.3 (1987) ("[T]here is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical . . . ."); *Block v. Hirsch*, 256 U.S. 135, 156 (1921) (rejecting due process challenge to rent control ordinance, but indicating that an ordinance valid under due process standards might go "too far" and amount to a taking). It is the court's opinion, therefore, that a challenge to rates set under the State's police power which alleges "confiscatory rates"

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[9] This analytical approach was recently employed by the 1st Circuit Court of Appeals to review gasoline rates established by the territory of Puerto Rico. *Tennoco Oil Co. v. Dept. of Consumer Affairs*, 876 F.2d 1013 (1st Cir. 1989). The court stated that the challenge to the gasoline price setting regulations and rates required the court to "examine the lower court's determination under both clauses of the Constitution, recognizing that analysis under the takings clause may be different from that under the due process clause." *Id.* at 1021. The *Tenoco* court, however, viewed the due process inquiry as one that focused on "whether, overall, a program is arbitrary, discriminatory or irrelevant to a legitimate legislative goal" not on the "economic adequacy of the permitted prices. . . ." *Id.* This court, for the reasons provided in the text of the opinion, disagrees that only the takings clause, not the due process clause, constitutionally protects the adequacy of the rates themselves.

must be conducted under both the due process clause and the takings clause to determine if the rates are constitutionally valid and, if not, what relief is available to the regulated business. If the alleged "confiscatory rates" effected not a "taking" but a "deprivation of property," then just compensation under the takings clause would not be available to the plaintiffs.

The court's view that the term "confiscatory rate" encompasses two separate constitutional commands, and therefore, two separate constitutional inquiries, standards and remedies is supported by the law of regulatory takings in the land use context. *See e.g., Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) [hereinafter *Penn Central*]; *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922) [hereinafter *Pennsylvania Coal*]. In the context of a land use "regulatory takings" or "inverse condemnation" [19] the general rule is that

> [W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.

Id. at 415, quoted in *First English*, 482 U.S. at 316. The Supreme Court has explicitly recognized that diminished property values resulting from police power regulatory actions do not always rise to the level of a "taking."

> If [an] ordinance is otherwise a valid exercise of the . . . police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional. . . . This is not to say, however, that governmental action in the form of regulation can-

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[19] Inverse condemnation occurs when a taking is effected not through a formal condemnation procedure, but through regulatory actions authorized under a state's police powers. *First English*, 482 U.S. at 316.

not be so onerous as to constitute a taking which constitutionally requires compensation.

Goldblatt v. Town of Hempstead, 369 U.S. 590, 592 and 594 (1962) (citations omitted). In land use "regulatory takings" law, therefore, there is a continuum along which the exercise of police powers at one point may simply implicate due process deprivation of property concerns but at another point may be so onerous as to implicate the takings clause. The exact point at which a regulation becomes so onerous, or goes "too far," has never been precisely delineated by the Supreme Court and, in fact, has been recognized as impossible to locate except on an ad hoc basis. "There is no set formula to determine where regulation ends and taking begins." *Goldblatt v. Town of Hempstead*, 369 U.S. at 594.

The law of regulatory takings in the land use context, therefore, points the way for the court to reconcile *Duquesne*'s reintroduction of the law of takings into the ratemaking context with the Supreme Court's earlier substantive due process holdings. In short, the constitutional limits under the takings clause for both "regulatory takings" and "confiscatory rates" doctrines is that point on the continuum of police power regulations beyond which the exercise of police powers has gone so far as to be the equivalent of a takings in the law of eminent domain. *Jersey Central Power & Light Co. v. F.E.R.C.*, 810 F.2d 1168, 1188-94 (D.C. Cir. 1987) [hereinafter *Jersey Central III*] (whether a takings occurs in the utility ratesetting process is determined by using criteria established in "regulatory takings" law). J. Drobak, *From Turnpike to Nuclear Power: The Constitutional Limits on Utility Rate Regulation*, 65 B.U.L. Rev. 65, 98 (1985) ("The lower limit imposed on rates by the constitutional ratemaking doctrine is equivalent to the limit imposed on other kinds of economic regulation by the regulatory takings doctrine.") Therefore, while a rate

that diminishes the value of a regulated industry's property by imposing an unfair rate of return on capital investments may constitute a taking, such a finding would rest on whether the regulation goes "too far" or is so "onerous" as to deprive the owner of almost all use of the property. If not, the property interests are protected only by the substantive due process doctrines developed under *Hope Natural Gas*, *Natural Gas Pipeline*, and *Permian Basin*.

B. *Application of Regulatory Takings Law to Plaintiffs' Claim* [11]

For purposes of this motion, the court assumes the factual allegations made by the plaintiffs are true. The determination of whether a police regulation has gone so far as to be a taking under the law of regulatory takings is "essentially . . . ad hoc [and] factual." *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). The Supreme Court has developed a multifactor balancing test involving three major, but not exclusive factors, to guide the making of this determination. The three factors are "the economic impact of the regulation, the extent to which it interferes with investment-backed expectations, and the character of the governmental action." *Id.* *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432 (1982). *See also*, *Jersey Central Power & Light Co. v. F.E.R.C.*, 810 F.2d at 1192-94 (Starr, J. concurring) (application of three criteria to utility rates).

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[11] The pleadings present sufficient factual allegations to show that the rates may have been confiscatory—i.e. not sufficient to provide a fair rate of return of the investment capital of the plaintiffs—to withstand a motion for summary judgment if the claim was based upon a substantive due process challenge. The plaintiffs' claim, however, is based solely on the takings clause. It is that issue alone, therefore, which is addressed by the court in the remainder of this opinion.

1. *Economic Impact on Property Owner*

In order for a regulatory taking to occur, the economic impact on the owner must be so severe as to almost result in the complete destruction of the "aggregate property rights" of the owner. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163-64 (1980); *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979).

> In deciding whether a particular governmental action has effected a taking, this Court focuses . . . both on the character of the action and on the nature and extent of the interference *with rights in the parcel as a whole* . . . .

Penn Central, 438 U.S. at 130 (1977) (emphasis added). The diminution of property value, standing alone, cannot establish a taking requiring just compensation. *Id.* at 131. *See, Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (zoning law reducing property value by 75% not a taking); *Hadachek v. Sebastian*, 239 U.S. 394 (1915) (zoning law reducing property value by 87.5% not a taking).

The plaintiffs in the present proceeding have alleged that the "confiscatory rate" imposed by the Superintendent resulted in a loss of earnings of approximately Fifty Million Dollars ($50,000,000.00). The pleadings do not indicate the amount of capital invested in the plaintiffs' insurance companies. The complaint simply states that the plaintiffs "devoted substantial amounts of capital" in the Maine market. The court presumes that the capital invested by the companies was substantially greater than Fifty Million Dollars ($50,000,000.00). In any event, the plaintiffs have not alleged that the "confiscatory rates" actually diminished the capital invested in the company, but rather that the rates were "grossly inadequate" to provide a "fair return" on the capital invested.

Under the takings doctrine, the loss of earnings—even if this is considered a property right that is capable

of being "taken" by the State—standing alone cannot constitute a taken. *Penn Ceneral*, 438 U.S. at 131. The Supreme Court has specifically held that an actual return on investments is not necessary for a regulation to be upheld under a takings clause challenge. *See*, *Andrus v. Allard*, 444 U.S. at 51, 64 (1979). "[T]he denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking because the aggregate must be viewed in its entirety." *Id.* at 65-66. *See also*, J. Drobak, *From Turnpike to Nuclear Power: The Constitutional Limits on Utility Rate Regulation*, 65 B.U.L. Rev. at 110 n.221. The most that can be said is that an alleged loss of earnings, i.e. a failure to enjoy a rate of return on an investment, may constitute one factor to determine whether a taking has occurred. *F.P.C. v. Florida Power Corp.*, 480 U.S. at 253. The public purpose behind the challenged State regulation, in particular, may outweigh the owner's inability to earn a return on investment. *Andrus v. Allard*, 444 U.S. at 51. In *Penn Central*, furthermore, the Court implied that the question of whether a taking occurred involves whether the regulations have an "unduly harsh impact upon the owner's use of property", *Penn Central v. New York City*, 438 U.S. at 127, whether the owner can obtain "a 'reasonable return' on its investment," *Id.* at 136, or whether the property remains "economically viable." *Id.* at 138 n.36.

The substantial public interest furthered by the rates established under the Act and the substantial property rights left to the plaintiffs under the Act leads the court to conclude that the alleged Fifty Million Dollar ($50,000,000.00) loss does not rise to the level of a near total destruction of aggregate property use that is required under the regulatory takings doctrine. *Compare Jersey Central Power & Light Co. v. F.E.R.C.*, 810 F.2d 1168, 1192 (D.C. Cir. 1987) (regulation might constitute a taking where plaintiff represents that "it is pre-

viously close to the edge of bankruptcy, unable to secure long-term credit, and unable to attract capital to the enterprise.").

2. *Interference with Investment-Backed Expectations*

As a general matter, investors expect to earn a return on investments and, in a regulated industry such as the insurance and utility industries, investors most likely expect that their investments would be relatively safe and secure. J. Drobak, *From Turnpike to Nuclear Power: The Constitutional Limit on Utility Rate Regulation*, 65 B.U.L. Rev. at 106-07. Although the regulations may have resulted in significant losses, the overall legislative reform effort cannot be viewed as overly detrimental to the investors over the long-term. First, the rates were part of a comprehensive effort to reform the Workers' Compensation System. As part of the effort to achieve the necessary support for the entire package of reforms, rates were reduced on the one hand while on the other hand potential liabilities of the insurers were reduced. It is not unreasonable to suppose that the insurers, who were active in the legislative process, benefited from the overall reform effort despite the loss in return on investments for the period in question.

In any event, investors in regulated industries have been warned since *Hope Natural Gas* that investor interests may be balanced against public interests to determine whether a rate is constitutionally reasonable. Although *Hope* discussed constitutional rates in terms of substantive due process, the balancing of investor expectations against the public interest was recognized in the takings context in *Penn Central*. 438 U.S. at 128. The balancing of interests, therefore, between investor expectations and the public interest is applicable to takings challenges in the ratemaking context. Any investor expectations, therefore, must reasonably include the possible expectation that in certain circumstances the public interest may outweigh the investor expectation that a rate

of return will be allowed by the ratemaking authorities. J. Drobak, *From Turnpike to Nuclear Power: The Constitutional Limit on Utility Rate Regulation*, 65 B.U.L. Rev. at 105-06.

Therefore, although this element of the multifactor inquiry does favor the plaintiffs, the reform effort did not altogether destroy reasonable investor-backed expectations in the workers' compensation industry. In any event, the temporary nature of the alleged reduced earnings mitigates the adverse impact on investor expectations.

3. *Character of the Government Intrusion*

In the eminent domain, or "classic," takings context, the government intrusion constitutes the actual total physical acquisition of property. *See e.g., United States v. Lynah*, 188 U.S. 445, 468-70 (1903). In the land use takings field the intrusion on the property is not actual physical possession, nor need it be permanent to constitute a taking, but it must deprive the property owners of almost all beneficial uses of the property. *See, First English*, 482 U.S. at 321. The government "intrusion" in the present case is substantially less than in either the classic eminent domain takings context or in the regulatory takings context. Here the rates charged by the insurers were established for only a limited period of time at the alleged "confiscatory" rate. Importantly, the insurers, unlike public utilities, were not required to continue providing service in the State but were allowed by law to discontinue service in Maine and, in fact, did so. Although the plaintiffs may have lost the ability to earn a rate of return for a limited period of time, they retained possession and control of their investment capital.

CONCLUSION

In conclusion, after weighing the three factors listed above, the court determines that the rates, even if "confiscatory" in the substantive due process sense of the

term, did not constitute a taking under the "takings clause" of the 5th and 14th Amendments to the United States Constitutions and art. 1, § 6-A of the Maine Constitution.

WHEREFORE, the Order and Entry shall be:

Defendant's motion for summary judgment is GRANTED.

DATED: January 2, 1991

/s/ S. L. Perkins
STEPHEN L. PERKINS
Justice, Superior Court

APPENDIX D

STATE OF MAINE
CUMBERLAND, SS.

SUPERIOR COURT
Civil Action

Docket No. ———

AIU INSURANCE COMPANY, AMERICAN FIDELITY COMPANY, AMERICAN HOME ASSURANCE COMPANY, BIRMINGHAM FIRE INSURANCE CO. OF PENNSYLVANIA, COMMERCE & INDUSTRY INSURANCE CO., GRANITE STATE INSURANCE CO., INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, NATIONAL UNION FIRE INSURANCE CO. OF PITTSBURGH, PA, NEW HAMPSHIRE INDEMNITY COMPANY, INC., NEW HAMPSHIRE INSURANCE COMPANY, *Plaintiffs*

VS:

SUPERINTENDENT, MAINE BUREAU OF INSURANCE, *Defendant.*

COMPLAINT

NOW COME THE PLAINTIFFS, and allege as follows:

1. Plaintiff AIU Insurance Company is a corporation organized under the laws of New York. Plaintiff American Fidelity Company is a corporation organized under the laws of Vermont. Plaintiff American Home Assurance Company is a corporation organized under the laws of New York. Plaintiff Birmingham Fire Insurance Co.

of Pennsylvania is a corporation organized under the laws of Pennsylvania. Plaintiff Commerce & Industry Insurance Company is a corporation organized under the laws of New York. Plaintiff Granite State Insurance Co. is a corporation organized under the laws of New Hampshire. Plaintiff Insurance Company of the State of Pennsylvania is a corporation organized under the laws of Pennsylvania. Plaintiff National Union Fire Insurance Co. of Pittsburgh, PA is a corporation organized under the laws of Pennsylvania. Plaintiff New Hampshire Indemnity Company, Inc. is a corporation organized under the laws of New Hampshire. Plaintiff New Hampshire Insurance Company is a corporation organized under the laws of New Hampshire.

2. Plaintiffs were licensed to and did write workers' compensation insurance in the State of Maine beginning at various times in the 1970s and extending through December 31, 1987.

3. During the period from August 1, 1985 to December 31, 1987, as well as prior to this period, Plaintiffs did business in Cumberland County, Maine.

4. During the period from August 1, 1985 to December 31, 1987, as well as prior to this period, Plaintiffs devoted substantial amounts of capital, as required by Maine Law, to the business of writing workers' compensation insurance in the State of Maine.

5. Defendant is the Superintendent of the Maine Bureau of Insurance (hereafter the "Superintendent"). Under Maine law, the Superintendent was responsible for administering the laws that governed the provision of workers' compensation insurance in Maine during the period August 1, 1985 through December 31, 1987.

6. All Maine employers are and have been for many years required to secure payment of workers' compensation benefits. In most cases, employers cover this risk by obtaining workers' compensation insurance.

7. The rates for workers' compensation insurance in the State of Maine have for many years been controlled by law. Despite the fact that the Maine workers' compensation system evolved to provide one of the most expensive benefit packages in the United States, and that the medical costs covered by workers' compensation have risen dramatically throughout the 1980s, insurance rates from early 1981 through 1984 were held constant by the State of Maine and, as explained more fully in paras. 14-17, below, rates in 1985 and 1986 were actually rolled back to levels below those in 1981.

8. The National Council on Compensation Insurance (hereafter "NCCI") has been and is an organization authorized by law to file proposed rates on behalf of carriers writing workers' compensation insurance in Maine. For each of the three years 1982 through 1984, NCCI applied for rate increases. During these years a rate application for workers' compensation insurance was subject to an "all or nothing" statute, meaning that if the applicant failed to prove entitlement to the full amount of the proposed rate increase, it was entitled to no increase at all. The governing rate-making statute during this period was also calculated to make proof of entitlement to a rate increase difficult to establish. With respect to each of the three years 1982 through 1984, the Superintendent rejected NCCI's applications for a rate increase on narrow and largely technical grounds. In none of the three years in questions did the Superintendent make a finding that workers' compensation rates were already adequate to provide insurers with a fair rate of return.

9. As a consequence of the unfair and inadequate rates that had been prevailing in the State of Maine during the early 1980s, insurance carriers writing workers' compensation insurance in Maine from 1979 to 1984 paid out in losses (benefits) and expenses an average of $1.85 for each $1.00 collected in premiums.

10. Since at least 1972, the workers' compensation insurance market in Maine has been composed of two dis-

tinct markets: the "voluntary" market and the "assigned risk" or "residual" market. The voluntary market is comprised of employers that insurance carriers are willing to insure without regard to any legal requirement that they do so. The residual market is composed of employers who are unable to obtain insurance in the voluntary market for the following reasons among others: a demonstrated accident frequency problem, a measurable adverse loss ratio over the period of years, or a demonstrated attitude of noncompliance with safety requirements.

11. In order to write workers' compensation insurance in the State of Maine, insurance companies must obtain from the Superintendent and hold a certificate of authority to write workers' compensation insurance.

12. Since at least 1972, the Superintendent has required insurance companies to provide coverage to residual market risks as a condition for obtaining and holding a certificate of authority to write workers' compensation insurance. Accordingly, the Superintendent has made the provision of coverage to residual market employers a requisite to writing voluntary workers' compensation insurance in the State.

13. In 1985, the Maine legislature enacted P.L. 1985, c. 372, entitled "An Act to Improve the Workers' Compensation System and Reform the Rate-Making Process" (hereafter the "1985 Act"). As explained further at par. 23, below, the 1985 Act codified the requirement that insurance carriers engaging in the business of writing workers' compensation insurance provide such coverage to the residual market.

14. The 1985 Act also included section 2355, a provision governing rates for workers' compensation insurance during the period August 1, 1985 through December 31, 1988.

15. For the period, August 1, 1985 through December 31, 1986, section 2355(2) required the workers' compen-

sation insurance rates be set such that the overall manual rate level of the rates would be at least 8% below that of rates in effect on January 1, 1985. Since no rate increase had been allowed since early 1981, the rates in effect on January 1, 1985 were in fact the same as those in effect in 1981; as noted, the rates in force from 1981 to 1985 were already grossly inadequate.

16. Under section 2355(2), the 8% rate rollback was in all respects mandatory. That is, the rollback was not contingent on any rate-making proceeding or finding that the rate reduction was in fact warranted, and it was binding without exception on all carriers with respect to all workers' compensation insurance written in the State. The Superintendent did, however, subsequently hold a hearing, as section 2355(2) required, to determine if any further rate reduction, beyond the 8% cut, would be warranted.

17. Section 2355 of the 1985 Act also required at subsections (3) and (4) that the mandatory 8% rate reduction remain in effect through 1986 and that rates in 1987 be increased by no more than 10% above the rolled-back 1986 level; under Section 2355(5), an additional increase of no more than 10% was permissible beginning in 1988.

18. Pursuant to the terms of Section 2355, on or about July 5, 1985, the Superintendent of Insurance initiated proceedings to promulgate the new, statutorily required workers' compensation insurance rates.

19. On or about August 27, 1985, the Superintendent issued an interim order directing that the minimum, statutorily required 8% rate reduction for workers' compensation insurance be effective from August 1, 1985. The Superintendent also instituted rate-making proceedings, as required by the 1985 Act, to determine whether a greater than 8% reduction in rates was appropriate. Hearings on this matter concluded in the Summer of 1986.

20. On or about October 10, 1986, the Superintendent issued a final decision and order on the mandated rate reduction. The Superintendent explicitly determined that the minimum 8% rate reduction required workers' compensation insurers to operate at an inadequate rate of return. Accordingly, the Superintendent concluded that although he was required by law to reduce rates by at least 8%, it would be improper for him to reduce rates further.

21. In 1987, the Superintendent authorized a workers' compensation insurance rate increase of 10%, the maximum allowed by the 1985 Act. Although the 1985 Act purported to allow this meager rate adjustment as of January 1, 1987, Maine rate-filing requirements were designed such that the filing for 1987 residual market rates could not possibly be made until December of 1986, thus ensuring that the Superintendent would not act on the proposed rates until well into 1987. In fact, the 10% increase in residual market rates provided for in the 1985 Act was not approved by the Superintendent and did not become effective until June 26, 1987.

22. The 10% increase in workers' compensation insurance rates permitted in 1987 brought rates back to just barely above what they had been in 1981, and was grossly inadequate to provide the Plaintiffs and other insurers with a fair return on their workers' compensation writings.

23. In order to secure a means by which residual market employers would be able to obtain insurance, the 1985 Act required that a plan "provid[ing] for the equitable apportionment among insurers" of residual market insurance (hereafter the "residual market plan") be filed by NCCI and approved by the Superintendent. Pursuant to the 1985 Act, NCCI filed the residual market plan in late 1985. The Superintendent adopted the residual market plan in relevant part on or about December 31, 1985.

24. The residual market plan as originally approved by the Superintendent met the 1985 Act's requirement of providing for the equitable apportionment of residual market policies in the following way. Carriers choosing to do so volunteered to act as "servicing carriers" of residual market policies in exchange for a percentage of the premium collected on those policies. Under the plan, servicing carriers were in all respects responsible for administering the policies and any claims arising under them. The losses generated by residual market policies were shared by all carriers writing workers' compensation in Maine, whether servicing carriers or not, through a reinsurance pool. Under the governing rules of the reinsurance pool, and consistent with the 1985 Act's requirement that residual market insurance be equitably apportioned, residual market losses were apportioned among carriers according to each carrier's relative share of the total voluntary market; that is, an insurer writing 10 percent of the voluntary insurance was assessed 10 percent of the residual market's losses, and so on.

25. Although the 1985 Act constituted the first time that the State of Maine had statutorily mandated that carriers writing workers' compensation insurance in Maine participate in the residual market, as set forth more fully in paras. 11-12, above, the Superintendent was already requiring carriers to furnish insurance to the residual market at the time the 1985 Act was enacted. As a consequence workers' compensation carriers in Maine were already adhering to essentially the same servicing carrier/reinsurance pool arrangement as provided for in the residual market plan when the 1985 Act became law.

26. During the period August 1, 1985 through December 31, 1986, as well as prior to this period, all carriers writing workers' compensation insurance in the State of Maine participated in the reinsurance pool. For the period January 1 through December 31, 1987, only one major insurance group, comprising three companies,

elected not to participate in the reinsurance pool arrangement. During this same period, some approximately 125 other companies continued to participate.

27. The reinsurance pool was essential to the availability of residual market insurance in Maine both before and after the adoption of the 1985 Act, and was all relevant times recognized by the Superintendent to be an integral part of the residual market plan.

28. Increasingly following passage of the 1985 Act, and for reasons attributable to the grossly inadequate rates that had persisted in Maine, carriers that had been willing to act as servicing carriers no longer volunteered to do so. On or about September 30, 1986, after NCCI advised the Maine Bureau of Insurance that there were inadequate numbers of carriers to service residual market policies voluntarily, the Superintendent ordered that the residual market plan be modified such that the Superintendent would henceforth assign residual market policies to carriers on an involuntary and mandatory basis in proportion to each carrier's share of the total voluntary market. The Superintendent's order of September 30, 1986 continued in force the reinsurance pool arrangement whereby residual market losses were shared by workers' compensation insurance carriers. Pursuant to his order, the Superintendent thereafter began assigning residual market policies to carriers for servicing.

29. Despite the Superintendent's finding on or about October 10, 1986, that the rates being allowed for workers' compensation insurance in the State of Maine were inadequate, he nevertheless compelled Plaintiffs during the period August 1, 1985 to December 31, 1987, and all other companies voluntarily writing workers' compensation insurance in the State, to write residual market policies as directed by the Superintendent. At various times during this period, the Superintendent signaled his willingness to use highly aggressive and coercive methods to ensure that carriers not withdraw from the workers' compensation insurance business in Maine as a means of eliminating

their purported obligation to write residual market policies.

30. Directly due to the 1985 Act's inadequate and unfair rate scheme, governing both the voluntary and residual markets, and to the 1985 Act's requirement that carriers writing workers' compensation insurance provide coverage to the residual market, all of which was enforced by the Superintendent's orders, Plaintiffs have incurred damages that will exceed at least $50 million. Since liabilities stemming from coverage provided during the period August 1, 1985 through December 31, 1987 have not fully become known, the full measure of damages that has been and will be sustained by Plaintiffs also has not been finally determined.

31. On November 20, 1987, the Maine legislature enacted S.P. 704 L.D. 1929 (hereafter the "1987 Act"), repealing the 1985 Act. The 1987 Act established new rate-setting procedures to be used by the Superintendent, but expressly prohibited him from reflecting losses attributable to the inadequacy of the 1985 Act's rates in any new rates the Superintendent set. No new rates were in fact promulgated under the 1987 Act prior to December 31, 1987, by which date Plaintiffs had ceased writing new workers' compensation policies in the State.

32. On or about September 20, 1985, NCCI filed an action in Maine Superior Court seeking to enjoin the 1985 Act and the Superintendent's orders enforcing it. Notwithstanding its finding that the 1985 Act and Superintendent's orders precluded carriers from earning a fair rate of return, in a May 14, 1987 ruling, the Maine Superior Court declined to enjoin operation of the statute. Subsequently, on March 4, 1988, the Supreme Judicial Court of Maine, hearing the case on appeal, dismissed the action solely on the ground that repeal of the 1985 Act had rendered an action to enjoin the 1985 Act moot. In so ruling, the Supreme Judicial Court expressly observed that it had not been presented with an action in which damages arising from the 1985 Act had been sought.

33. As a direct consequence of the 1985 Act's inadequate and unfair rates, as enforced by the Superintendent, and further due to the 1985 Act's requirement that carriers writing workers' compensation insurance provide coverage to the residual market, again, as enforced by the Superintendent, Plaintiffs were unable to realize a fair return on the workers' compensation coverage they provided during the period August 1, 1985 and December 31, 1987.

34. The rates and residual market scheme imposed by the 1985 Act and the Superintendent during the period August 1, 1985 until December 31, 1987 were confiscatory and amounted to a taking of the Plaintiffs' property without payment of just compensation, in violation of the Fifth and Fourteenth Amendments of the United States Constitution, and Article I, section 21 of the Constitution of the State of Maine.

WHEREFORE Plaintiffs request an award of damages in the amount of the just compensation due for the taking of Plaintiffs' property from August 1, 1985 to December 31, 1987, with the exact amount to be established at trial, as well as interests, costs and attorneys fees.

Dated at Lewiston, Maine this 26th day of July, 1989.

/s/ Jack H. Simmons
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CONSENT AND ACKNOWLEDGEMENT OF SERVICE

STATE OF MAINE
CUMBERLAND, ss.

AIU vs. Superintendent of Insurance

Due and sufficient service of process is hereby acknowledged for and on behalf of the Defendant Superintendent of Insurance; all formal service of process is hereby waived.

Dated: July 26, 1989

/s/ Thomas M. Record
THOMAS M. RECORD
Attorney for Defendant

APPENDIX E

STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
Civil Action

Docket No. ———

NATIONAL COUNCIL ON COMPENSATION INSURANCE, an unincorporated association authorized to do business in Maine,

and

LIBERTY MUTUAL INSURANCE CO. and LIBERTY MUTUAL FIRE INSURANCE CO., corporations licensed to do business in Maine,

Plaintiffs

VS.

SUPERINTENDENT OF INSURANCE,

Defendant

Harold Pachios (orally), Marc B. LeDuc (orally), Preti, Flaherty, Beliveau & Pachios, Portland, for Nat. Council on Compensation Ins.

Kevin M. Gillis (orally), Richardson & Troubh, Portland, Stephen A. Rusconi (orally), Boston, Mass., for Liberty Mut.

Bruce C. Gerrity (orally), Preti, Flaherty, Beliveau & Pachios, Augusta, for Home Ins. Co.

James E. Tierney, Atty. Gen., Linda M. Pistner (orally), Asst. Atty. Gen., Augusta, for Superintendent of Ins.

William C. Perkins (orally), William C. Black (orally), Public Advocate, Augusta, for Public Advocate.

Thomas R. Watson (orally), Patrick N. McTeague, McTeague, Higbee, Libner, Reitman, Macadam & Case, Topsham, for Maine AFL-CIO.

Albert G. Ayre (orally), Pierce, Atwood, Schribner, Allen Smith & Lancaster, Portland, for Maine Chamber of Commerce.

Before McKUSICK, C.J., and NICHOLS, ROBERTS, WATHEN, GLASSMAN, SCOLNIK and CLIFFORD, JJ.

McKUSICK, Chief Justice.

The National Council on Compensation Insurance (NCCI),[1] two Liberty insurance companies[2] (Liberty), and The Home Insurance Company (Home) appeal from a Superior Court (Kennebec County) decision rejecting their challenge to the constitutionality in its operation of a 1985 statute that mandated an immediate reduction in workers' compensation insurance rates, required participation in an assigned risk pool, and placed a limit on future rate increases. While this appeal was pending, the legislature repealed the entire 1985 statute and substantially modified the Maine workers' compensation system in regard to both insurance rates and compensation benefit levels. As a result this appeal has become moot and must be dismissed.

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[1] NCCI is a rating organization, licensed under 24-A M.R.S.A. § 2310 (1974 & Supp.1987), that is authorized to act on behalf of its insurer members. *See National Council on Compensation Ins. v. Superintendent of Ins.*, 481 A.2d 775, 778 (Me.1984).

[2] Appellants Liberty Mutual Insurance Company and Liberty Mutual Fire Insurance Company will in this opinion be referred to jointly as "Liberty."

In 1985, the legislature enacted 24-A.M.R.S.A. §§ 2331-2357, the Workers' Compensation Competitive Rating Act. P.L.1985, ch. 372, § B(5). Section 2355 of the Rating Act directed a reduction beginning on August 1, 1985, of at least 8% in workers' compensation insurance rates. Section 2355 also barred any increase in those rates until January 1, 1987, and limited rate increases in 1987 and 1988 to not more than 10% over the next preceding year's rates. Pursuant to section 2355, the Superintendent of Insurance issued an interim order on August 27, 1985, reducing rates by 8% retroactive to August 1, 1985. Following lengthy hearings, the Superintendent issued a final order on October 10, 1986, confirming the 8% reduction contained in the interim order.

By section 2350, the 1985 Rating Act also established a "residual market mechanism" or assigned risk pool to provide workers' compensation insurance coverage for employers unable to procure insurance in the voluntary market. 24-A M.R.S.A. § 2350 (eff. January 1, 1986). The section required all insurers authorized to write workers' compensation insurance in Maine to participate in the assigned risk pool. *Id.* § 2350(1)(A). Until September 1, 1986, under a plan administered by NCCI, servicing carriers wrote policies for the assigned risk pool on a voluntary basis. As of September 1, 1986, however, too few carriers were voluntarily participating in the assigned risk pool to afford coverage for all employers. Following refusal by NCCI to assign carriers to the assigned risk pool on an involuntary basis, the Superintendent after hearing, on September 30, 1986, entered a mandatory assignment order, by which the Superintendent took over administration of the assigned risk pool and made mandatory assignments of carriers to the pool based on the carriers' respective shares of the voluntary market over the preceding three-year period. The Superintendent excluded from the mandatory assignment order any carrier that had less than a 1% market share or was in perilous financial condition.

NCCI with Liberty joining as a co-plaintiff filed in the Superior Court a timely complaint (hereafter "the NCCI complaint") seeking judicial review of the Superintendent's 8% reduction orders. The NCCI complaint alleged that section 2355 violated constitutional due process by imposing confiscatory rates while denying the insurers an opportunity to apply for rate increases necessary to ensure a fair return. That complaint, in addition to seeking a declaratory judgment that section 2355 was unconstitutional, sought 1) an M.R.Civ.P. 80C order reversing the Superintendent's 8% reduction orders or alternatively directing the Superintendent after hearing to permit workers' compensation rates to be raised to an "adequate level," and 2) an injunction against the Superintendent's exercising any of the powers or duties respecting the enforcement of the rate reduction and rate limits of section 2355.

Liberty and Home in timely fashion filed in the Superior Court separate, but similar complaints (hereafter "the Liberty/Home complaints") seeking judicial review of the Superintendent's mandatory assignment order of September 30, 1986.[3] The Liberty/Home complaints alleged that the mandatory assignment order by requiring those insurers to provide coverage to assigned risk employers at rates reduced and limited as mandated by section 2355 resulted in the unconstitutional taking of the insurers' property without due process of law. Those complaints asked the Superior Court to reverse the mandatory assignment order under M.R.Civ.P. 80C and to enjoin the Superintendent from putting into effect any order pursuant to section 2350 requiring the insurers to accept assigned risks in the future.

The Superior Court heard the challenges to the constitutionality of section 2355 and the mandatory assign-

[3] Peerless Insurance Company filed a similar complaint and participated in the consolidated proceeding in the Superior Court, but has not appealed.

ment order in a single consolidated action.[4] After hearings that concluded on March 2, 1987, the Superior Court on May 14, 1987, rejected the parties' constitutional challenges, affirmed the Superintendent's 8% reduction and mandatory assignment orders, and denied all requested injunctive relief. NCCI, Liberty, and Home then appealed to the Law Court. We heard oral argument on the merits of the appeal on November 10, 1987.

On November 20, 1987, the legislature enacted as emergency legislation P.L.1987, chs. 559-560, An Act to Improve the Maine Workers' Compensation System. The 1987 Act repealed the 1985 Rating Act, 24-A M.R.S.A. §§ 2331-2357, in its entirety. In addition, the 1987 Act comprehensively overhauled the Maine workers' compensation system, both in the setting of insurance rates and the eligibility for and the amount of workers' compensation benefits. At our request, the parties filed supplemental briefs on the question whether the appeal was mooted by the repeal of section 2355 and the enactment of the other provisions of the 1987 Act. We heard oral argument on the mootness issue on January 14, 1988.

I.

The gravamen of the NCCI complaint was that the limits imposed by section 2355 upon workers' compensation insurance rates resulted in those rates being confiscatory when matched against the benefits the Workers' Compensation Act requires insurers to underwrite for injured workers. Asking for a declaration of that confiscation, the complaint sought only prospective relief; namely, an injunction against the enforcement by the Superin-

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[4] The consolidated action also included complaints filed by the Maine Chamber of Commerce and Industry and the Public Advocate objecting to the Superintendent's refusal to reduce the rates by more than 8%. The AFL-CIO joined the consolidated action as an intervenor. None of those parties appeal the Superior Court judgment.

tendent of the section 2355 limits on insurance rates along with a reversal of his 8% reduction order or alternatively a remand to the Superintendent for a new rate inquiry. That same confiscation allegedly produced by section 2355 when applied to the then existing workers' compensation benefits levels was also at the heart of the Liberty/Home complaints challenging the validity of the Superintendent's mandatory assignment order. The Liberty/Home complaints also sought only prospective relief; namely, an injunction against the Superintendent's requiring those companies to participate in the assigned risk pool at the section 2355 rates. Since the NCCI and the Liberty/Home complaints raised a factual issue of confiscation, the Superior Court hearings made an evidentiary record for the purpose of establishing the expected return to the insurers from the rates imposed under section 2355 as applied to the costs of the workers' compensation benefits as then prescribed by statute. That evidentiary record closed more than a year ago.

On their appeal, NCCI and the two insurers ask that we hold that the Superior Court erred in refusing to enjoin the Superintendent from enforcing section 2355 and from making mandatory assignments to the insurers from the assigned risk pool. The repeal of section 2355 and the major overhaul of the workers' compensation system affected both the premium rates that workers' compensation carriers may charge and the cost to those carriers of the workers' compensation benefits underwritten by them. As of November 20, 1987, the legislature has returned to the Superintendent the task of fixing "just and reasonable" rates, unrestricted by any legislatively imposed maxima and "[b]ased only on a just and reasonable profit." P.L.1987, ch. 559, § 4. Simultaneously, the legislature has changed the cost factor in the equation determining insurance companies' profits by significantly modifying eligibility requirements and the allowable amounts of benefits required to be paid to injured work-

ers under the Workers' Compensation Act.[5] Those changes in eligibility requirements and benefit levels apply to all injuries occurring on or after the effective date of November 20, 1987. P.L.1987, ch. 560, § 12. The overall consequence of those changes is to reduce, in an amount yet to be determined, the cost to insurance companies of performing on their contractual obligations under policies that either were outstanding on that date or are issued thereafter.

We are presented with a classic example of an appeal that has become moot. It is a "firmly entrenched doctrine that a court should decline to decide issues which . . . by virtue of legally valid and recognizable supervening circumstances have lost their controversial vitality . . . ." *Good Will Home Ass'n v. Erwin*, 285 A.2d 374, 379 (Me. 1971). *See also Graffam v. Wray*, 437 A.2d 627, 631 (Me.1981); *Taylor v. Commissioner of Mental Health and Mental Retardation*, 431 A.2d 1304, 1306-07 (Me. 1981). The question posed by this appeal whether the Superior Court erred by refusing to enjoin the Superintendent's enforcement of the rate reduction and limits imposed by section 2355 and his mandatory assignments under those rates has no continuing vitality. *See Taxpayers for the Animas-La Plata Referendum v. Animas-La Plata Water Conservatory District*, 739 F.2d 1472, 1478-79 (10th Cir.1984). Since the repeal of section 2355 on November 20, 1987, any injunction issued against the

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[5] *See, e.g.*, P.L.1987, ch. 559, § 21 (automatic suspension of benefits if employee refuses to allow employer access to physician's records); *id.* § 22 (commission to set maximum charges for medical services); *id.* § 27 (compensation for total incapacity not subject to annual adjustments until third anniversary of injury); *id.* § 30 (compensation for partial incapacity not payable for longer than 400 weeks after maximum medical improvement); *id.* § 33 (commission to set schedule for determining existence and degree of permanent impairment based on generally accepted medical standards); *id.* § 38 (fixed period of formal, mandatory retraining with benefits terminating 6 months after retraining program completed).

Superintendent's enforcement of that defunct statute would be meaningless and of no practical consequence whatever.[6] Furthermore, the evidentiary record before us on appeal, which addressed the factual issue of confiscation as it was claimed to exist prior to the final hearing over a year ago, reflects costs to the insurers of a statutory benefit program that has now been superseded by a presumably less costly system. Thus, anything that we could decide on this appeal would be an answer only to a question that existed prior to November 20, 1987, but on that date became thereafter academic. Considerations of judicial restraint dictate that we not engage in such an academic exercise. *See Graffam v. Wray*, 437 A.2d at 631.

II.

In an attempt to avoid application of the rule of mootness, appellants raise an assortment of arguments. We find none of those arguments persuasive.

Appellants first contend that they are still entitled to an injunction against the enforcement of the section 2355

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[6] Liberty and Home did seek an injunction against the Superintendent's mandatory assignment order for a further reason that has not been mooted by supervening circumstances. They contended that that part of the order that excluded from assignments any carrier that had less than a 1% market share or was in perilous financial condition, violated the requirement of 24-A M.R.S.A. § 2350 that "[a]ll insurers authorized to write workers' compensation and employers' liability insurance in this State shall participate in the [assigned risk] plan." That claim renewed on appeal has not been mooted (despite the repeal of section 2350) because the residual market mechanism created by the Superintendent's mandatory assignment order continues to operate until the Superintendent modifies or suspends his order. *See* P.L.1987, ch. 559, § 7. We, however, find no merit in the insurers' argument. The Superintendent has a general duty to enforce the Insurance Code, 24-A M.R.S.A. §§ 211, 212 (1974); and we "give the Superintendent's construction of the statute great deference . . . unless [it] plainly compels a contrary result." *York Mut. Ins. Co. v. Superintendent of Ins.*, 485 A.2d 239, 241 (Me.1984).

limitations on rates. They base their contention on the fact that the section 2355 rates, which they claim are confiscatory, will continue to prevail in the period until the Superintendent authorizes new rates in a rate proceeding brought under the 1987 Act. This contention is quickly answered. Whether any confiscation exists in this period of "regulatory lag" is impossible of determination from the record on appeal, which reflects the costs of a compensation benefit scheme that was superseded as of November 20, 1987.

Appellants next contend that the insurers may want to claim compensatory relief from the State or from their policyholders on account of the allegedly confiscatory rates imposed in the past under the now-repealed section 2355. The insurers, however, neither pleaded nor tried any such compensatory claims in the Superior Court and they should not be heard in doing so for the first time on appeal in this case. *See Cuthbertson v. Clark Equip. Co.*, 448 A.2d 315, 317 n. 1 (Me.1982); *Cannan v. Bob Chambers Ford*, 432 A.2d 387, 388-89 (Me.1981).

Appellants also fail in their attempt to bring themselves within any of the special, limited exceptions to the rule of mootness that we recognized in *State v. Gleason*, 404 A.2d 573 (Me.1979):

> First, the court will determine whether sufficient collateral consequences will result from determination of the questions presented so as to justify relief. Second, while technically moot in the immediate context, questions of great public interest may nevertheless be addressed for the future guidance of the bar and of the public. Third, issues which may be repeatedly presented to the trial court, yet escape review at the appellate level because of their fleeting or determinate nature, may appropriately be decided.

Id. at 578 (citations omitted).

First, we are told that a decision on the merits of the present appeal would aid in the disposition of separate

litigation now pending in the Superior Court involving efforts of Liberty and Home to withdraw from writing workers' compensation policies in Maine. The insurers, however, provide us with no information that shows that a decision on the merits of this appeal would have anything more than "conjectural and insubstantial consequences" on that other litigation. *See Bennett v. State*, 289 A.2d 28, 32 (Me.1972). That is not enough to prevent mootness.

Second, we are told that the present appeal, although mooted, involves an issue of great public importance that should "be addressed for the future guidance of the bar and of the public." *State v. Gleason*, 404 A.2d at 578. Despite the great public interest in the effectiveness and stability of the Maine workers' compensation system, the public interest in the constitutional validity, at some time at least a year ago, of rates set under a now-repealed statute and previously applicable to no longer existing circumstances is negligible, if not non-existent.

Finally, we are told that the present appeal, although mooted, should be decided under the "capable of repetition, yet evading review" exception to the mootness rule. *See id.* This appeal, however, is not appropriate for application of that narrow exception. The inquiry is not whether the activity in this particular appeal ended before it was fully litigated but rather whether the activity itself is by nature so short in duration that it will not be fully litigated before the objected to activity ends. *Conyers v. Reagan*, 765 F.2d 1124, 1128 (D.C.Cir.1985). Only speculation in the extreme would suggest that the same concatenation of circumstances from which this litigation arose will repeat itself. *See Taxpayers for Animas-La Plata Referendum*, 739 F.2d at 1479. The mere theoretical possibility of repetition is not enough. 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3533.3, at 297 (1984).

In these circumstances we have no reason to relax the well-established requirement that an appeal present a continuing and vital controversy before we render a decision on the merits. There is no relief of practical consequence that we can afford appellants on this appeal. Deciding upon the constitutionality of rates set under a now-repealed statute, on an evidentiary record of underwriting costs under a now-superseded benefit scheme, would be a purely academic exercise. It would run counter to the spirit, if not the letter, of the constitutional prohibition against rendering advisory opinions except as required by Me. Const. art. VI, § 3. *See Perry v. Hartford Accident and Indemnity Co.*, 481 A.2d 133, 136 (Me. 1984). Governing principles of appellant adjudication require dismissal of this appeal for mootness.

The entry is:

Appeal dismissed.

All concurring.

APPENDIX F

STATE OF MAINE
KENNEBEC, SS.

SUPERIOR COURT
Civil Action

Docket No. CV-85-459
CV-86-490
CV-86-502
CV-86-506
CV-86-508
CV-86-510

NATIONAL COUNCIL ON COMPENSATION INSURANCE, LIBERTY MUTUAL INSURANCE CO., *et al.*, PEERLESS INSURANCE CO., THE HOME INSURANCE CO., MAINE CHAMBER OF COMMERCE AND INDUSTRY, *et al.*, and THE PUBLIC ADVOCATE, *Plaintiffs*

v.

THE SUPERINTENDENT OF INSURANCE, *Defendant*

and

THE MAINE AFL-CIO, *Intervenor*

OPINION AND ORDER

This matter is before the Court in six consolidated actions challenging various aspects of the workers' compensation insurance rate-setting law and rate-making process resulting from amendments to the Workers' Compensation law adopted by P.L. 1985 c. 372. This opinion will address those challenges. For this case, the benefit level and benefit eligibility criteria established by the

Legislature are taken as a given, the question becoming the adequacy of the rate-making law and process in light of those benefits. No issue is raised regarding the adequacy or inadequacy of the workers' compensation benefit levels or benefit eligibility criteria, and no such issues will be addressed by this Court either directly or by implication.

I. *Factual and Procedural History:*

The National Council on Compensation Insurance is an insurance rating organization of workers' compensation insurers. In Maine it has been designated as the statistical representative of workers' compensation insurers, 24-A M.R.S.A. § 2341(2), and, for many years, has filed applications for increases in workers' compensation insurance rates, on behalf of its members with the Superintendent of the Bureau of Insurance. It is a rating organization licensed by the Bureau of Insurance, 24-A M.R.S.A. § 2310.

Until recently, the National Council on Compensation Insurance also operated a voluntary assigned risk pool by which employers whose claims history or other factors indicating a high risk of potential claims would have their policies assigned in a manner which spread the risk across the member companies.

Generally, the National Council on Compensation Insurance has been the exclusive representative on behalf of the workers' compensation insurance writers before the Superintendent of Insurance. However, recently, some other companies, particularly Liberty Mutual Insurance Company, which had been the largest policy writer in the State, have begun to take an independent role in some proceedings. Further, and as discussed *infra*, the 1985 amendments appear designed to promote more frequent direct dealings between individual carriers and the Bureau of Insurance.

The rates for workers' compensation insurance have traditionally been controlled by statute. A rate increase

was last granted to Maine workers' compensation insurers in 1981.

In 1982, NCCI filed another application for an increase in workers' compensation insurance rates. After hearings before the Superintendent of the Bureau of Insurance, in February of 1983, this application was denied. The denial was issued under provisions of 39 M.R.S.A. § 22 which essentially required the Superintendent of Insurance to engage in an all or nothing consideration of the workers' compensation rate filing. The Superintendent's denial of the rate increase request and the all or nothing aspects of the statute were appealed, ultimately to the Supreme Judicial Court. There the Superintendent's denial of the rate increase request was affirmed, *National Council on Compensation Insurance v. Superintendent of Insurance*, 481 A.2d 775 (Me. 1984).

The Law Court opinion extensively discusses the old ratemaking law and the issues in that case. Shortly after the Law Court opinion, the Maine Legislature began serious consideration of a comprehensive benefit level, eligibility and ratemaking reform to the Maine workers' compensation laws. In 1985, this consideration resulted in adoption of P.L. 1985, c. 372 "An Act to Improve the Workers' Compensation System and Reform and Ratemaking Process." The Act included: 1) benefit reforms which, it was hoped, would reduce the cost of providing workers' compensation; 2) a safety program to assist in reducing the frequency and severity of injuries, plus a comprehensive rehabilitation program to facilitate the return of injured workers to productive employment; and 3) complete change of the ratemaking law.

The new ratemaking law abandons reliance on an insurance rating organization to make rate filings for the voluntary market. Instead, each insurer is expected to file its own voluntary market rates, 24-A M.R.S.A. § 2338. Filing or distribution of voluntary market rates by an advisory organization is prohibited, 24-A M.R.S.A.

§ 2347; although an advisory organization may file proposed residual or assigned risk market rates, 24-A M.R.S.A. § 2350(3)(D). The stated statutory purpose of all of this is to improve competition in the workers' compensation insurance industry, 24 M.R.S.A. § 2332. Accordingly, after a transition period, which is the primary focus of this litigation, only assigned risk market rates will remain subject to the Superintendent's prior approval and the specific disclosure requirements and detailed standards for such approval contained in 39 M.R.S.A. § 22-D, *see* 24-A M.R.S.A. § 2339(1)(c).

Voluntary market rates need only be filed within five days of their use, 24-A M.R.S.A. § 2338(1). They are subject only to general rating standards similar to those applicable to other property/casualty rates, unless the Superintendent has determined that the market is noncompetitive or that the insurer's financial condition or rating practices require closer supervision. If the market is found to be noncompetitive, prior approval of rates is again required and certain of the provisions of 39 M.R.S.A. § 22-D are applicable. *Cf.* 24-A M.R.S.A. §§ 2335, 2338(2).

Section 22-D, as enacted by Chapter 372, was changed to avoid the all or nothing aspects of the previous § 22-C (Pamph. 1986) as highlighted in *National Council on Compensation Insurance v. Superintendent of Insurance*, 481 A.2d 775 (Me. 1984). First, the Superintendent's authority to "establish" rates under § 22-D(7) permits approval of a rate increase in an amount other than that requested. Second, § 22-D(6) allows an applicant to complete or amend a filing found by the Superintendent to be incomplete.

To permit a reasonable transition to a new period of stricter controls on benefits, safety and rehabilitation reforms and hoped for ratesetting competitiveness, a transition provision, 24-A M.R.S.A. § 2355, was adopted, effective July 1, 1985. Section 2355 is a particular focus

of controversy in this case. The critical provisions at issue are subsections 1, 2, 3, and 4 which provide:

> 1. Purpose. The provisions of this section reflect the rate effect of amendments to Title 39 implemented by Public Law 1983, chapter 479 and by this Act and the consideration of investment income attributable to insurance premiums and reserves which income has not previously been considered in establishing present rates.
>
> 2. Rate reduction. A rate filing shall not be effective after the effective date of this section unless the overall manual rate level is reduced at least 8% from the overall manual rate level in effect on January 1, 1985. If no rate filing is effective after the effective date of this section, the superintendent shall immediately promulgate rates, to be effective on August 1, 1985, whose overall manual rate level is reduced at least 8% from the overall manual rate level effective on January 1, 1985. The superintendent's determination without a filing shall require notice and hearing as provided under Title 5, chapter 375, subchapter IV; and the notice and hearing provisions of this Title and Title 39, sections 22-C and 22-D shall not apply.
>
> A. "Overall manual rate level" means the projected total amount of money to be generated by the application of manual rates per $10 payroll on file with the superintendent, exclusive of any rating system adjustments, including minimum premiums, loss constants, experience or retrospective rating plans or dividend plans.
>
> B. An insurer may not use a rate for workers' compensation insurance higher than this rate.
>
> 3. Rates during 1985 and 1986. From July 1, 1985, to December 31, 1986, each insurer's rates shall not exceed the workers' compensation rates in effect on

June 30, 1985, except that this rate shall be adjusted under subsection 2.

4. Rates during 1987. From January 1, 1987, to December 31, 1987, each insurer's rates shall not exceed the workers' compensation rates in effect on December 31, 1986, increased by no more than 10%.

. . . .

Thus, workers' compensation insurance rates, which had not been increased since 1981, were to be reduced by at least 8 percent effective August 1, 1985; remain at the reduced rate through 1986, and increase by no more than 10 percent in 1987, subsection 4, and an additional 10 percent in 1988, subsection 5.

No rate filing complying with § 2355(2) was made by or on behalf of any insurer writing workers' compensation in this State on or before the July 1, 1985 effective date. Therefore, by notice issued on July 5, 1985, the Superintendent of Insurance initiated proceedings as required by § 2355(2) to promulgate rates, to be effective August 1, 1985, reflecting a reduction of at least 8 percent in the current overall rates for workers' compensation insurance. The National Council on Compensation Insurance was designated a party to that proceeding, as required by 24-A M.R.S.A. § 2306. Intervenor status was granted to Liberty Mutual Insurance Company and its affiliate Liberty Mutual Fire Insurance Company; United States Fidelity and Guaranty Company; the Maine Chamber of Commerce, in concert with a group of associations and individual employers; the Public Advocate; and the National Federation of Independent Business.

The Superintendent then asked for comment on issuance of an interim order requiring an 8 percent rate reduction effective August 1, 1985, subject to later adjustment in the event that the final rate reduction determined after hearing was greater than 8 percent. After briefing on the issue the Superintendent issued an In-

terim Order on August 27, 1985, requiring an 8 percent reduction in the overall rate level, to be implemented within 30 days and effective from August 1, 1985.

The National Council on Compensation Insurance and Liberty Mutual unsuccessfully sought to enjoin the August 27, 1985 order which took effect September 26, 1985. It remained in effect pending completion of the 8 percent ratemaking proceeding.

Hearings on the question of whether rates should be reduced by more than 8 percent began on August 28, 1985. Those hearings were completed in the Summer of 1986.

The Public Advocate and the Chamber of Commerce urged that the scope of the hearings be limited to consideration of cost savings resulting from benefit changes. The carrier's argued that the entire financial picture of the industry should be considered in evaluating whether an 8 percent or greater reduction should be imposed. Basically, NCCI's view on this issue prevailed, as indicated in an August 27, 1985 letter from the Superintendent to the parties.

On October 10, 1986, the Superintendent issued a decision and order. In that decision he declined to reduce rates further than the 8 percent reduction ordered on August 27, 1985, retroactive to August 1, 1985. The Superintendent found that the savings from the legislative changes in the workers' compensation law appeared to be slightly more than 8 percent, being in the range of 8.4 percent to 11.4 percent, but he also determined that the insurers in the aggregate would not earn what the parties agreed and what he found to be a fair rate of return relative to other available economic choices. Order, October 10, 1986 at 15. Accordingly, the Superintendent determined that based on the standards contained in 24-A M.R.S.A. § 2337 and 39 M.R.S.A. § 22-D, it would be improper to reduce rates beyond the 8 percent reduction if he was to assure that rates not be set which are inadequate, excessive or discriminatory.

The Superintendent specifically found as follows:

> I cannot conclude that current rates are deficient by a precise amount based upon the evidence in this case as there are valid criticisms of each party's method and further because the propriety of inputs to these models such as loss ratios would be fully tested only in the context of a rate filing. However, the preponderance of the evidence in the record indicates that taking into account the savings generated by P.L. 1983, c. 479 and P.L. 1985, c. 372, current levels of investment income and the 8% manual rate reduction, insurers will, in the aggregate, achieve a rate of return which is somewhere between the NCCI's .93% figure and Dr. Chang's 8.9% and 8.0%, and therefore significantly below the 14.7-17.0% range. Therefore, based upon the rating standards contained in 24-A M.R.S.A. § 2337 and 39 M.R.S.A. § 22-D concerning the determination of just and reasonable rates, I conclude that it would be improper to reduce rates beyond the 8% reduction which has already been implemented pursuant to my interim order in this proceeding

There is dispute in this proceeding about the proper scope of the 8 percent hearing, but this finding based on the record of the 8 percent hearing does not appear to be seriously challenged as unsupported by the evidence.

While the 8 percent proceeding was pending, significant problems appeared in management of the assigned risk or residual market now addressed by 24-A M.R.S.A. § 2350. Such an assigned risk mechanism had existed for many years prior to the 1985 amendments as a voluntary arrangement created by insurers pursuant to 24-A M.R.S.A. § 2325(1) (1974). Participation in the Maine workers' compensation assigned risk plan has been a condition of holding a certificate of authority to write workers' compensation insurance in Maine since at least 1972.

With the adoption of § 2350, the workers' compensation residual market mechanism was expressly mandated by statute and divided into two accounts: the Accident Prevention Account and the Safety Pool. The Accident Prevention Account is for employers who are unable to obtain insurance through ordinary methods because of their demonstrated accident frequency, measurably adverse loss ratio over a period of years or demonstrated attitude of noncompliance with safety requirements, § 2350(1). The Safety Pool is intended to provide an alternative source of insurance for employers with good safety records, § 2350(2).

Original plans for the operation of these two accounts were submitted by the NCCI in its capacity as designated advisory organization. According to the statute, all insurers authorized to write workers' compensation insurance in the State are required to participate in the Accident Prevention Account and Safety Pool. 24-A M.R.S.A. § 2350(1)(A) & (2)(E).

Selected insurers serve as "servicing carriers" for policies issued in the residual market. Servicing includes functions performed by an insurer with respect to a voluntary market policy, except that the servicing carrier does not bear the ultimate responsibility for payment of losses. For its efforts, the servicing carrier receives 40 percent of the policy premium plus certain expenses. The remaining premium dollars are applied to payment of losses. Losses exceeding premium payments, the "underwriting loss" are paid through a pool of insurers writing workers' compensation. To cover underwriting losses, pool members are assessed on a pro rata basis according to the market share of each pool participant in the policy year in which the losses are paid.

Upon learning from NCCI that adequate numbers of servicing carriers would not be available on a voluntary basis after September 1, 1986, the Superintendent sched-

uled an adjudicatory hearing to consider amending the plans of operation for the residual market to assure adequate servicing and to assure that servicing assignments were made equitably. Following the hearing, the Superintendent issued an order directing NCCI to make servicing assignments to the extent that servicing carriers could not be procured on a voluntary basis, such assignments to be made to insurers which individually or as part of a group of companies had a voluntary market share which averaged one percent or more over the 1983-1985 period. *See* Decision and Order, August 29, 1986.

If it found the Insurance Superintendent's allocation method unacceptable, the August 29 Order afforded NCCI the opportunity to prepare an alternative basis for equitable apportionment of residual market losses. The record does not indicate that any such proposal ever was made. Instead, on September 4, 1986, NCCI informed the Superintendent that it could not administer a plan in which servicing carriers would participate on other than a voluntary basis. The Superintendent then scheduled a further hearing for the purpose of reconsidering the August 29, 1986 order. After the hearing, he issued a Decision and Order on Reconsideration, dated September 30, 1986.

The Superintendent's September 30 Order amended his August 29th decision to provide for servicing assignments to be made directly by the Insurance Bureau whenever a voluntary carrier was not available, and amended the plans of operation for the residual market to the extent necessary to so provide. The one percent three-year average market share standard for determining which insurers would be eligible for servicing assignments was retained.

Assignments are currently made under a system which allocates policies to those companies which are designated servicing carriers on the basis of voluntary market share

in the most recent year for which that data is available, which was 1985 at the time of trial. When 1986 data is available, the assignments may be based on 1986 voluntary market share. However, the record indicates that certain changes in the allocation procedure are currently under consideration.

Servicing assignments have been made by the Insurance Bureau for all policies issued in the residual market on or after October 1, 1986, for which no servicing carrier is available on a voluntary basis. There is a voluntary servicing carrier for eleven counties in the State. Policies covering risks in the remaining five counties must be assigned, except those which are voluntarily renewed by their current servicing carrier as existing residual market policies expire.

Currently, workers' compensation insurance for approximately 85 percent of Maine insured employers is written through the assigned risk or "residual market" pool, although this pool covers only about 50 percent of the insured workers and paid premium. The scope of the problem is indicated by earlier, April 1986, statistics that out of 22,112 insured Maine employers, 16,793 were then insured through the residual market. Currently well over 18,000 Maine employers would be insured on the residual market if the 85 percent figure is correct. Thus, management of the assigned risk pool has a major impact on business operations in the State.

The risk and loss assignment procedure through the Superintendent after October 1 has basically followed the patterns established when the residual market pool was administered by NCCI, but with two significant differences.

First, the voluntary plan required participation by all companies licensed to write workers' compensation insurance in the state—*see* Def. Exh. 1, "Maine Workers' Compensation Insurance Plan" Part A. *See also* 24-A M.R.S.A. § 2351(1)(A) & (2)(E). The mandatory plan

excludes participation by carriers with less than one percent of the voluntary market share in the 1983-1985 base years and other carriers whose position is viewed as financially precarious by the Superintendent.

Second, under the NCCI voluntary assignment plan, a high risk employer's coverage could be terminated if that employer refused to follow a carrier's recommendations to improve safety or otherwise meet reasonable health and safety requirements. The Insurance Superintendent will not permit cancellation of coverage for employers who have particularly bad safety records, even if such employers disregard suggestions to improve workplace safety for their employees.

Plaintiffs, Peerless, Home and Liberty Mutual have each decided to stop writing voluntary workers' compensation insurance policies. They participate in the Maine market only as a result of receipt of assigned risk employers through the Bureau of Insurance.

The rate which the employer must pay when assigned through the assigned risk pool, while effected somewhat by experience and injury record, includes a cap which cannot be exceeded regardless of how bad a safety record an employer has or how unsafe an operation the employer runs. In addition, although policies are assigned by the Insurance Superintendent's order, a January 26, 1987 order specifies that carriers must continue to pay commissions to agents for unwanted assigned risk business.

Subsequent to the above matters, the 10 percent rate proceeding as authorized by 24-A M.R.S.A. § 2355(4) has been initiated with the insurance companies making their filings through NCCI. That proceeding is ongoing. Generally, it appears that evidence in this proceeding, where relevant to the confiscation issue, has been presented on the assumption that the 10 percent rate increase would be granted. The law also sets a 10 percent cap on any rate increases for 1988, 24-A M.R.S.A. § 2355(5), before the transition period comes to an end.

Seven suits have resulted from the various orders already issued by the Insurance Superintendent.

1. In Docket No. CV-85-459 NCCI and Liberty Mutual Insurance Company challenge the order of August 27, 1985, although the action appears more directed at the mandated 8 percent rate reduction and the 10 percent rate increase caps than at any actions in which the Insurance Superintendent had significant discretion. Specifically, plaintiffs in 85-459 assert (a) that the mandatory 8 percent reduction provisions of the law amount to confiscation without just compensation by imposing rates which will fail to provide an adequate rate of return and may in fact impose losses of money, (b) that such provisions also violate due process of law in denying individual carriers and the industry generally the ability to seek a rate increase where such would be justified to earn a fair rate of return and (c) that the 1985 amendments improperly bar consideration of the insurance companies' needs and their financial viability despite the Insurance Superintendent's obligation to assure that insurance companies are financially viable which is imposed by 24-A M.R.S.A. § 410 and Bureau of Insurance Regulations, Chap. 230 § 3(C)(S)(C).

2. In Docket No. CV-86-490 Liberty Mutual Insurance Company challenges the order of September 30, 1986, making the assigned risk plan mandatory and operated by the Superintendent of Insurance effective October 1, 1986. Liberty Mutual asserts that, as applied to it, the assigned risk plan amounts to an unconstitutional taking without compensation and a violation of due process of law because there is no administrative relief available to avoid losses. Liberty Mutual also maintains that the Superintendent lacks statutory authority to impose the assigned risk plan. The suit also questions whether the assigned risk process conflicts with the separate obligation of the Insurance Commissioner to ensure financial viability of insurance companies doing business in Maine, and asserts that the assignment process violates the In-

surance Superintendent's duty to act reasonably and consistent with the law, 24 M.R.S.A. § 212.

3. In Docket No. CV-86-502 the Maine Chamber of Commerce and Industry and a number of other plaintiffs challenge the October 10, 1986 order for leaving the 8 percent rate reduction ordered August 27, 1985, in effect and not reducing rates further. These plaintiffs argue that the Insurance Superintendent erred in not reducing rates further despite his finding that the value of savings as a result of statutory amendments exceeded 8%. They also argue that the Insurance Superintendent, in the course of the hearing, improperly considered the financial status of the insurance carriers and general rate adequacy in reaching his decision.

4. In Docket No. CV-86-506 Peerless Insurance Company challenges the September 30, 1986, order mandating assigned risks. Essentially, this suit, with amendments which have been allowed, makes the same claims as asserted by Liberty Mutual Insurance Company in Docket No. CV-86-490.

5. In Docket No. CV-86-508 the Home Insurance Company also challenges the September 30, 1986, order raising the same claims as asserted by Liberty and Peerless in Docket Nos. CV-86-490 and CV-86-506 respectively.

6. In Docket No. CV-86-510 the Maine Public Advocate challenges the Superintendent of Insurance, raising the same claims as asserted by the Chamber of Commerce and Industry and other consumer plaintiffs in Docket No. CV-86-502. The Public Advocate asserts that earnings and rate of return issues should not have been considered in the 8% rate hearing without the insurance companies making the required filing pursuant to 39 M.R.S.A. § 22-C.

7. In Docket No. CV-87-67 Liberty Mutual Insurance Company challenges the order of January 26, 1987, requiring that it pay commissions to insurance agents on policies issued under the assigned risk plan. That action

has not been consolidated in this proceeding. It has been stayed pending decision in the other consolidated cases, although Liberty is presently seeking a stay of enforcement of the order to pay commissions.

No insurance carrier has appealed from the October 10, 1986 order in the 8 percent proceeding, although the order is inferentially challenged in the confiscation cases.

By court order dated December 9, 1986, the first six above actions were consolidated for hearings, although the Court is sitting as an appellate court on some aspects of the matters while it is hearing *de novo* those portions of the cases which assert confiscation without compensation or due process violations. Also by order of December 9, 1986, the Maine AFL-CIO was granted intervenor status, as it had been an active participant in some of the administrative proceedings and demonstrated a major interest in the results.

The consolidated cases as refined by the briefs present several issues to the Court for determination.

1. *Confiscation generally:*

Does the statute in mandating at least an 8 percent rate reduction effective August 1, 1985, and in limiting any rate increase to no more than 10 percent in 1987 and 1988 impose upon the Maine workers' compensation insurance industry generally a confiscation without due process and just compensation in violation of Article I, Section 6A [1] and Section 21 [2] of the Maine Constitution

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[1] Art. I, § 6-A reads as follows:

No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of his civil rights or be discriminated against in the exercise thereof.

[2] Art. I, § 21 reads as follows:

Private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it.

and the Fifth and Fourteenth Amendments of the United States Constitution?

2. *Confiscation specific:*

Does the statute as applied and interpreted by the Insurance Superintendent impose a confiscation without due process and just compensation upon any or all of the individually named plaintiffs Liberty Mutual Insurance Company, Peerless Insurance Company or The Home Insurance Company?

3. *Ultra vires action:*

Has the Insurance Superintendent acted beyond the scope of his statutory authority in issuing his September 30, 1986, order establishing and requiring carriers participation in the mandatory assigned risk pool?

4. *Acting fairly:*

Has the Insurance Superintendent violated his statutory duty to act fairly and reasonably by imposing the mandatory assigned risk plan on most but not all present or former workers' compensation insurance carriers in Maine?

5. *Further lowering rates:*

Did the Superintendent of Insurance act improperly in considering evidence of general rate adequacy and the insurance companies' financial status and in refusing to lower rates even further, in his October 10, 1986, order in the face of his finding that the legislative adjustment of the benefit and eligibility packages were creating a savings greater than 8 percent?

II. *Confiscation Claims*

In *National Council on Compensation Insurance v. Superintendent of Insurance*, 481 A.2d 775 (Me. 1984) the Law Court suggested a standard to be used in examining a confiscation claim:

> "In order to establish an unconstitutional confiscation, NCCI must prove that its members are without the opportunity to realize a reasonable return on their investment in Maine and that the inadequate return results directly from the rate approval process and not from other causes."

Id. at 781 citing *Massachusetts Automobile Rating and Accident Prevent Bureau v. Commissioner of Insurance*, 424 N.E.2d 1127, 1135 (Mass. 1981).

See also F.P.C. v. Hope Natural Gas Co., 320 U.S. 591 (1944), rate caps must be "just and reasonable" such that "the return to the equity owners should be commensurate with returns on investments in other enterprises having corresponding risks" *Id.* at 603. However, investment reasonableness of rates is not the only criteria for analysis in a constitutional confiscation case. "Such regulation of maximum rates or prices 'may, consistently with the Constitution, limit stringently the return recovered on investment, for investor's interests provide only one of the variables in the constitutional calculus of reasonableness.'" *Federal Communications Commission v. Florida Power Corp.*, 55 L.W. 4236, 4238 (U.S. Feb. 25, 1987); *Permian Basin Area Rate Cases*, 390 U.S. 747, 768-770 (1968).

Considering the Law Court's recent statement on the issue, this Court takes as a given the proposition that when other preconditions are met, confiscation may be established by showing a less than reasonable rate of return on workers' compensation business, even if some profit is demonstrated. Accordingly, this Court did not consider alternative theories suggesting confiscation can be proven only if a compulsory loss or inadequate rate of return on a company's entire business in a state is demonstrated, *Cf. Baltimore and Ohio Railroad v. United States*, 345 U.S. 146, 148 (1953); *Workers' Compensation Rating and Inspection Bureau v. Commissioner of Insurance*, 461 N.E.2d 1178, 1189 (Mass. 1984).

The general standards of appellate decisions must be applied with caution to particular fact situations in confiscation cases. Analysis of constitutional "taking" or "confiscation" cases must be very fact specific, depending largely on the particular circumstances of each case. *Penn Central Transportation Co. v. New York City*, 438 U.S. 107, 123-124; *Seven Islands Land Co. v. Land Use Regulation Commission*, 450 A.2d 475, 482 (Me. 1982). For this case there may be important distinctions between confiscation analysis for insurance rate setting and confiscation analysis for cases involving rates for operation of fixed long term capital assets like power plants, gas lines, utility poles and telephone exchanges. Such facilities cannot be easily withdrawn from use or sold at or near fair market value if they are prevented from earning a reasonable return.

Accordingly, in its analysis, the Court must determine:

1. What is a reasonable and thus non-confiscatory return on investment for the Maine workers' compensation insurance industry.

2. Whether current rates of return meet the standard suggested by the Law Court.

3. Whether, if rates are below the standard, the problem "results directly from the rate approval process and not from other causes."

4. Whether industry wide data can be utilized to prove a confiscation case for the industry as a whole, and

5. Whether, if a confiscation case is otherwise established, it is effected by (a) the ability, or inability, of carriers to decline to write coverage, or (b) the temporary nature of the statutory rate restrictions.

A. *Reasonable Rate of Return*

Confiscation claims, like any other claims asserting unconstitutionality of a statute must be proven by clear and

convincing evidence. *CF. Warren v. Inhabitants of Town of Gorham*, 431 A.2d 624, 628-629 (Me. 1981). The non-insurance parties to this case urge the Court to impose a beyond a reasonable doubt standard of proof. That would make the case virtually impossible to prove, since it is virtually impossible to establish disputed matters of judgment and prediction of the future beyond a reasonable doubt, *Taylor v. Commissioner of Mental Health and Mental Retardation*, 481 A.2d 139, 146-147 (Me. 1984). The clear and convincing evidence standard, therefore, will be the burden imposed upon the insurance industry plaintiffs to establish their case.

Here there appears to be no significant dispute, within the range of findings necessary to decide this case, as to what is an adequate rate of return. In the order of October 10, 1986, the Superintendent of Insurance made no specific finding as to what is a fair rate of return. However, his order did note that among the diverse parties to that proceeding there was general agreement that a fair return on equity was the proper standard for measuring insurance company income and that: "There was substantial agreement among the parties that a fair return, in an economic sense, is in the range of 14.7-17.0 percent." Superintendent of Insurance, Order of October 10, 1986, at 11. The record of the 8 percent proceeding and the subsequent evidence filed with this Court fully support the observations of the Superintendent of Insurance. Even the opposition expert in this case testified to a return of 10 to 13 percent as a fair rate of return.

Based on the evidence before the Court, the Court finds that a fair rate of return for a property casualty insurer writing workers' compensation insurance within the State of Maine would be a return in the range of 11 to 14 percent on that portion of the insurer's equity properly assignable to Maine workers' compensation insurance. While the various parties might nibble at the edges of this finding, a finding within this range is almost universally accepted as a fair rate of return on equity for a

property casualty insurer. Considering the heavy burden of proof imposed in a constitutional case, adoption of a figure near the lower end of the various positions seems to be most appropriate.

B. *Current Rates of Return*

In the 8 percent rate proceeding, the Superintendent of Insurance also determined that the 8 percent rate reduction would result in a return on equity to Maine workers' compensation insurers at a rate "somewhere between" .93% and 8.9%, "therefore significantly below the 14.7-17.0 percent range." Thus, in setting the 8 percent rate reduction, the Insurance Superintendent explicitly determined that the 8 percent rate reduction would require insurers generally to operate at an inadequate rate of return.

Before this Court, a considerably greater volume of evidence has been presented than was presented before the Insurance Superintendent. Further, some of the assumptions and figures upon which even the NCCI relied in its presentation before the Insurance Superintendent have been adjusted in presentations before this Court and in the 10 percent rate filing which is part of this record.

Accordingly, this Court must independently determine rate of return based on current evidence. In this analysis the court basically utilizes the internal rate of return analysis presented by NCCI and the other insurance company participants in the proceeding. The Court rejects the alternative methods of analysis presented by the expert for the Public Advocate. These alternate methods focus on either cash payments or losses incurred for a particular calendar year. Such an analysis is too narrowly focused considering (a) the long term responsibilities carriers assume in issuing a single year policy that may have pay out responsibility five, ten or more years hence, (b) the heavy influence of past events on current cash flows,

and (c) the necessity of looking at present, not past, investment opportunities in projecting profitability of present policies.

The Internal Rate of Return Calculations presented by NCCI developed a negative rate of return of −1.55 percent for the Maine workers' compensation insurance industry. A significant potential flaw in such calculations is removed by NCCI's stipulation at trial that expense factors may be assumed to be zero and need not be considered by the court in evaluating the confiscation case. This adds a conservative element to NCCI's estimates and avoids dispute about such issues as how much central office overhead to allocate to Maine and other states. At the same time there are several points at which the Court determines that the Internal Rate of Return model tends to understate revenue or overstate loss projections resulting in assumed loss ratios of 280.7 for all business and 294.2 for assigned risk business.

First, the Court determines that the six percent after tax return on investment rate suggested by NCCI is too low. Even with the new tax code, the Court cannot accept the proposition that the insurance industry, with all its sophistication in both tax calculations and investments cannot earn a significantly higher rate of return than a relatively unsophisticated private investor who might buy a tax exempt bond or a long term certificate of deposit. The Court determines that the evidence, even some of that presented by the insurance companies, tends to indicate that a more realistic figure for return on investment is in the range of 8 to 9 percent on investment, and the Court finds such a figure to be the rate of return that can be expected on investments, at least as those investments are at issue in the confiscation portion of the case.

Second, the NCCI downward adjustment factor for the statutory benefit level changes was based on very limited experience with those changes. The NCCI figure focussed on the lower end of the 8 to 11 percent range of savings

determined by the Superintendent in the 8 percent proceeding. This involved the time of early implementation of the benefit changes. Their impact will surely grow as they become more fully effective in 1987 and 1988—the period of time at issue in 1987 written policies. Considering the clear and convincing evidence burden imposed on NCCI, the Court cannot find that the benefit level savings effecting 1987 policies will be anything less than a range of 12 to 14 percent.

Third, the Court determines that the indemnity loss development factor—that is the multiplier by which total losses on indemnity policies written in a particular year will increase in dollar value from the time they are originally incurred to the time they are ultimately paid out—a multiplier of 124.6 percent for 1984 business and 158 percent for 1985 business—is significantly above that loss development factor which can be reasonably expected to occur in the future. In reaching this conclusion, the Court does not quarrel greatly with the historical statistical calculations which lead to indication of such a high loss development factor.

However, the evidence contradicts NCCI's assumption that the past cost escalation is an accurate guide for future ratemaking. In the 10 percent rate filing, NCCI stated: "The basic assumption in casualty insurance ratemaking is that past experience can be used to project future rate need . . . all assumptions are correlative to this basic premise of actuarial science." Pl.Exh. 1, p. 03TP-0001. In workers' compensation practice experience based calculations extend a considerable time because *on the average* losses are paid 5.76 years after a policy is written.

The Court determines that the experience of the past 5 to 7 years or longer upon which calculation of the loss development factor is based, is not likely to be repeated for policies written from August 1, 1985, to December 31,

1987, the period at issue in the confiscation portion of this case. The Court's conclusion results from several factors:

1. The available data which significantly increases the loss development factor is greatly influenced by policies issued and losses incurred in years 1979, 1980, 1981 and 1982, periods of extraordinarily high inflation. There is no evidence that such a rate of inflation as has effected calculations relating to the loss development factor is likely to be soon repeated.

2. Compounding the effects of high inflation was a combination of legislative, administrative, and judicial actions, in Maine and elsewhere, that significantly increased workers' compensation benefit levels and, perhaps more importantly, significantly expanded benefit eligibility criteria, creating new categories of eligible workers and new types of injuries, particularly in the areas of stress, psychological problems, and occupational diseases for which compensation could be paid. Again, however, there is nothing in the record to suggest that such rapid expansion of benefit levels and eligibility criteria will continue to drive up the cost of workers' compensation in the future. In Maine at least, the legislative direction is the reverse, capping benefit levels and enacting other reforms designed to limit workers' compensation cost increases. While the escalations of the early 80's are fully reflected in the loss development factor criteria, the caps and limitations imposed in 1985 have had little time to take effect and thus have little impact on the statistics relating to the loss development factor. As already indicated, the Court determines that NCCI's calculations of benefit reform savings are unduly conservative.

3. When a worker injury is reported to an insurance company, the company promptly prepares an estimate of how much it anticipates may have to be paid out on that particular claim. This estimated amount is set aside as a "reserve" for the amount to be paid out on the policy.

Generally, the evidence indicates that reserving practices tend to be quite conservative, that is that they present a relatively low estimate of the amount likely to be paid out on the injury. This occurs for three reasons:

A. The reserve number is used by insurance adjusters as a possible settlement figure in adjusting claims. Therefore, the insurance companies keep the reserve figure low as a check on their claims adjusters' settlement practices.

B. Insurers have traditionally kept reserves low as an accommodation and marketing device to employers to maintain their good will and business since the employer's "experience rating" and thus the employer's premium on workers' compensation insurance could be significantly effected by an escalation in reserves for injuries occurring on that particular employers' premises.

C. Experience within the insurance industry has indicated that 90 to 95 percent of the reserve estimates tend to be reasonably accurate; that is, that the amounts paid out under the policy reasonably approximate the amount reserved when the loss was originally reported. Unfortunately for the industry, the approximately 1 out of every 10 cases that "go bad" dramatically increase the amounts paid out so that, in the aggregate, pay outs under a policy tend to be far above the reserve level because reserving practices include no procedure for factoring in potential pay outs on the 1 in 10 cases that "go bad." This in turn drives up the loss development factor.

The Court finds it difficult to believe that the admittedly conservative reserving practices which form the base figures from which the loss development factor is calculated have not changed and themselves become considerably more sophisticated over the past 5 to 7 years. This should have occurred because current cost squeezes in Maine and elsewhere provide a greater incentive to accurately estimate original reserves, particularly since higher reserves also may mean higher premiums. Focusing on Maine, there should clearly be no need to be con-

cerned about employer "good will" in an industry where 85 percent of the policies are distributed through the assigned risk plan and the industry claims it is scrapping for every dollar it can get. The carriers will benefit both in insurance rates and policy premiums by bringing aggregate reserves closer to realistic estimates of expected losses. Caps on benefit levels and eligibility criteria should also assist in reducing the wide gap between reserves and actual pay outs.

The above factors which drastically effected loss development statistics from early 1980's policies are not likely to continue to drive up the cost of policies issued in 1985, 1986, and 1987. Thus, NCCI's presented loss development factor must be reduced to a range of 90 to 110 percent which, the Court determines, more accurately reflects the loss development which is likely to occur on losses under presently and recently issued policies. This high percentage factor is primarily attributable to continuation of conservative, though more sophisticated, reserving practices.

Even with these adjustments to the NCCI internal rate of return model, however, the expected rate of return for the Maine workers' compensation insurance industry, assuming the 10 percent rate increase, only increases from the —1.55 percent estimated by NCCI to somewhere in the range of 0 percent to 5 percent. This is still well below the reasonable rate of return upon investment in the workers' compensation insurance industry which the Court has determined to be in the range of 11 to 14 percent.

The Court's 0 to 5 percent return estimate is developed by applying the combination of the projected benefits savings reforms and the revised loss development factor to reduce the projected underwriting margin from NCCI's —198.5 to something in the range of —125 to —75. More precise calculation is not possible from available evidence since there is considerable overlap of loss de-

velopment and benefit savings considerations. Thus, multiplying the court determined percentages directly into the NCCI formulas would overstate their impact. However, for purposes of this opinion, precise calculation is not necessary. The revised underwriting margins, applied to the Internal Rate of Return model produce a projected positive return of from +0.02 percent to +2.32 percent. The court determined revisions in return on investment then are applied to get the 0 to 5 percent rate of return determined above.

It must be emphasized that this return rate is the industry wide average, not a prediction of return for any particular carrier.

C. *Relation of Rate Levels to Rate Approval Process*

In the decade of the 80's, at least until the last couple of years, the workers' compensation insurance industry and the property casualty insurance industry as a whole, in Maine and nationally was not particularly profitable. In fact, many companies both inside and outside of the State of Maine were operating at a loss. These losses resulted from a combination of losses or unexpectedly low rates of return on investments, the rapid escalation of requirements for policy payments, discussed above, unrealistically conservative reserving practices which both reduced premium payments and made approval of increased rates more difficult, and a number of other factors not unique to the State of Maine. However, the current problem of low rates of return on currently issued policies is not a product of these past mistakes, except to the extent that these past mistakes may be regarded as contributing to failure to obtain greater rate increases in 1981 or any rate increases at all in later years. The Court does not regard these past failures as covered within the meaning of "other causes" as addressed in *National Council on Compensation Insurance v. Superintendent of Insurance*, *supra* at 781. Therefore, the Court deter-

mines that the current industry-wide rate of return, 0 percent to 5 percent, is attributable to the current limitations on rates and not other causes.

D. *Mandatory Risk Assignments*

With that determination, the Court turns to the confiscation claims pressed by the individual insurers. In the analysis, the industry wide evidence is helpful, as it provides an indication of the rate of return that may reasonably be expected, outside of factors unique to particular carriers, in the residual or assigned risk market. Each claim must be analyzed individually, but each claim contains the common question of whether the assigned risk plan adopted by the order of September 30, 1986, is a plan which prevents workers' compensation carriers from withdrawing from the Maine business and requires them to operate in Maine at a loss even if they do not desire to do so.

Initially, NCCI and the individual plaintiff carriers contend that it makes no difference whether their participation in the Maine workers' compensation insurance market is mandatory or voluntary. They contend that as long as maximum rates are regulated, and the rates are inadequate, a confiscation case is established, regardless of whether they can decline new business or not. In support of this proposition, the carriers cite *Aetna Casualty and Surety Co. v. Commissioner of Insurance*, 263 N.E.2d 698 (Mass. 1970). In that opinion, the Massachusetts Supreme Judicial Court did rule in an automobile insurance rate case as the carriers urge this Court to rule in the instant case. The Massachusetts court wrote:

> The Commonwealth's admitted power to regulate the insurance business and the rates which are charged for insurance does not permit it to limit the conduct of such business to those companies which submit to whatever rates the Commonwealth may fix, even if they be confiscatory. The writing of insurance is a

> lawful business and the Commonwealth may not impose unconstitutional conditions upon the exercise of the right to engage therein. . . . While it is not constitutionally required to fix rates which will guarantee a profit to all insurers, it may not constitutionally fix rates which are so low that if the insurers engage in business they may do so only at a loss. The insurers are not required to either submit to confiscatory rates or go out of business. They have a right to rates which are not confiscatory, or which satisfy any higher applicable statutory standards; and to a judicial review on the constitutional or statutory adequacy of such rates. *Id.* at 703 (citations omitted).

Interestingly, the critical portion of this opinion does not include any citation of authority.

The Massachusetts line of cases is not limited to insurance services, it also governs rate services, *G & M Employment Services, Inc. v. Commonwealth*, 265 N.E.2d 476 (Mass. 1976), as well as more traditional maximum rate setting involving rates for use of capital assets, *Cf. Fitchburg Gas and Electric Co. v. Department of Public Utilities*, 359 N.E.2d 1299 (Mass. 1977); *Niles v. Boston Rent Control Administrator*, 374 N.E.2d 296 (Mass. App. 1977).

The same principles have long governed capital asset utility ratemaking in Maine, "[a] company is entitled to a fair return, and less than a fair return would be confiscatory," *New England Telephone and Telegraph v. Public Utilities Commission*, 390 A.2d 8, 30 (Me. 1978); *Central Maine Power v. Public Utilities Commission*, 153 Me. 228, 250 (1957).

In *National Council on Compensation Insurance v. Superintendent of Insurance, supra*, the Law Court held that NCCI had failed to meet its burden of proof in establishing confiscation because it had failed to present evidence addressing one of the statutory criteria necessary for the determination of the adequacy of rates. In ad-

dition, the Court made the comment most frequently cited in this case:

> In order to establish an unconstitutional confiscation, NCCI must prove that its members are without the opportunity to realize a reasonable return on their investment in Maine and that the inadequate return results directly from the rate approval process and not from other causes. *Id.* at 781.

In these comments, the Law Court did not address (a) whether confiscation could be proven industry-wide, or whether it must be demonstrated by individual carriers, (b) the nature of the property interests subject to confiscation, (c) the manner by which a deprivation was accomplished or (d) the significance or insignificance of whether or not a carrier may voluntarily withdraw from the market. The Law Court did not have to address any of these points. It determined that any potential deprivation of NCCI's rights were due to its own actions not state action. The Court cited *Massachusetts Automobile Rating and Accident Prevention Bureau v. Commissioner of Insurance*, 424 N.E.2d 1127 (Mass. 1981) in support of its observations on confiscation.

Both the *Massachusetts Auto Rating* case cited by the Law Court and the more recent *Massachusetts Auto Rating and Accident Prevention Bureau v. Commissioner of Insurance*, 453 N.E.2d 381 (Mass. 1983) cite without discussion the holding in *Fitchburg Gas and Electric Company v. Department of Public Utilities*, *supra*, as the basis for the declaration that Due Process does not allow an insurer to be denied "an opportunity to realize a fair and reasonable return . . . [which] results directly from the rates set and not other causes." 424 N.E.2d 1124, 1135 (Mass. 1981). *Fitchburg*, a case considering claims of confiscation in capital asset utility ratemaking, in turn relied on *Boston Gas Company v. Department of Public Utilities*, 363 N.E.2d 713 (1975), again without discussion or independent analysis of this proposition. Tracing

the precedents cited in *Boston Gas, New England Telephone and Telegraph Company v. Department of Public Utilities*, 97 N.E.2d 509 (Mass. 1951) and *Federal Power Commission v. Hope Nature Gas Company*, 320 U.S. 591 (1944), one is led to *Bluefield Water Works and Improvements Company v. Public Service Commission*, 262 U.S. 679 (1923). *Bluefield*, in turn, relies on *Smyth v. Ames*, 169 U.S. 466, 577 (1898), a ruling on the constitutionality of a statute establishing rate regulation for railroad travel under a state constitutional provision declaring all railways to be public highways. *Smyth* declared that:

> "[t]he corporation may not be required to use its property for the benefit of the public without receiving just compensation for the services rendered by it. *Id.* at 546.

Smyth cited in support of that principle cases which address the issue of compulsion. *Id.* at 523-526.

Except for the Massachusetts insurance cases, all of the supporting precedent from *Fitchburg Gas* to *Smyth v. Ames* involve utility rates for use of capital assets on the ground or in the ground; tangible property in which substantial capital investment had been required and from which a reasonable return on investment was properly expected. The business of writing workers' compensation insurance policies involves no such tangible capital investments. If termination is voluntary, the business can be terminated within 60 days without capital losses and subject only to obligations to past and present policyholders. 24-A M.R.S.A. § 415-A. This is a critical distinction from most precedents suggesting that ratemaking is constitutionally obligated to assure a reasonable return on investment.

Law Court opinions directly addressing the "taking" issue have generally followed the narrow view of "taking" in the regulatory context adopted by the United

States Supreme Court in recent years, *see Seven Islands Land Co. v. Maine Land Use Regulation Commission*, 450 A.2d 475, 482-483 (Me. 1982); citing with approval *Agins v. Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed. 2d 106 (1980) and earlier cases holding that for an unconstitutional taking to occur, the compromise of property use or value must be such as to render the property substantially useless. It is difficult to see how an insurance company's property interests would be rendered substantially useless if they could refuse business or withdraw from business that would cause them to operate at a loss or at less than a reasonable rate of return. Their withdrawal leaves no useless wires in the air, pipes in the ground or power plants on the land. Their property interests are only substantially impaired or rendered useless if they are being coerced to do business and accept losses or an inadequate rate of return.

The carriers argue that there are certain economic and competitive factors that must be considered as preventing withdrawal, even if they could do so voluntarily. But other business considerations voluntarily imposed and accepted do not constitute a taking, for then it is the market place, not the government, that is putting the cost squeeze on the carrier.

Workers' compensation insurance has many of the attributes of other welfare and income maintenance programs provided directly by the state such as Unemployment Insurance or Medicaid. In this area the State, as a matter of legislative policy, might legitimately decide that private industry should be allowed to provide such insurance only if it could be done at appropriate cost and if not, then other alternatives to provide such insurance would have to be explored.

Accordingly, the Court rejects the carriers' contention that state established rates must allow a reasonable return on their investment, even if participation in the market is voluntary.

When a carrier voluntarily participates in the market it accepts both the many benefits and the significant obligations of state regulation. It cannot take one without the other. Accordingly, a carrier voluntarily participating in the Maine workers' compensation insurance market cannot claim confiscation when, as a condition of its participation, it is required to accept maximum rates and share assigned risks of the business. *Cf. California State Automobile Association Inter-Insurance Bureau v. Maloney*, 341 U.S. 105, 109-111 (1951). The next question becomes whether participation is voluntary.

At trial, the acting Insurance Superintendent testified in detail as to the important public purposes of availability of workers' compensation insurance and the consequent responsibility of those providing workers' compensation insurance in Maine to continue to make such insurance available. His testimony demonstrates the important public policy objectives at issue.

The Superintendent has indicated some actions he might take should a carrier refuse to accept assignments under the assigned risk plan. In November, 1986, Peerless Insurance Company returned an involuntary assignment on the grounds that it had not previously been written by Peerless on a voluntary basis. In response, the Insurance Superintendent indicated that should Peerless refuse to accept assigned risks, he may have been required to take actions which would affect the Peerless Insurance Company's ability to market other lines of insurance in Maine if they continued to refuse to write workers' compensation coverage.

In a November 21, 1986, letter, the Superintendent stated:

> "It cannot be left to individual companies to determine what assignments they are willing to accept."

He then suggested legal action if Peerless persisted in its refusal of the assignment:

> "First, the Maine Attorney General's Office has been asked to be prepared to proceed pursuant to 24-A M.R.S.A. Sec. 214(1) with an action in Superior Court to enforce the Superintendent's September 30th order. Secondly, violation of a lawful order of the Superintendent constitutes grounds for suspension or revocation of an insurer's certificate of authority under 24-A M.R.S.A. Sec. 417(1), following an administrative hearing.

At trial, the Insurance Superintendent also indicated that enforcement action would be contemplated against any carrier presently writing workers' compensation coverage who refused to continue to write such coverage under the assigned risk plan. Basically, the Insurance Superintendent has indicated a disposition to force current Maine carriers to continue to write workers' compensation coverage under the assigned risk plan in Maine if such is constitutionally permissible. Thus, participation by carriers averaging greater than one percent market share in the base years and not in financial distress is mandatory, not voluntary.

The carriers contend that this exercise of authority is beyond the scope of the Superintendent's statutory powers. The Insurance Code, 24-A M.R.S.A. § 2350, contemplates establishment of a "residual market mechanism" which "shall be composed of an accident prevention account and a safety pool." Thus, a residual market mechanism or assigned risk plan is specifically included in the statutory plan for a workers' compensation insurance system. Section 2350(1)(F) contemplates that the residual market mechanism shall be created from a plan submitted by "a designated advisory organization." However, the same subsection directs that such a plan must be "approved by the Superintendent." In the case before the Court, the only "designated advisory organization" has terminated its participation in an assigned risk plan. Accordingly, the Insurance Superintendent has proceeded to establish a plan on his own.

The law, 24-A M.R.S.A. § 211(1), mandates that the Superintendent "shall enforce the provisions of, and execute the duties imposed upon him by, this Title." The Superintendent has stepped into the vacuum left by the insurance industry. He has taken this action pursuant to 24-A M.R.S.A. § 212 which authorizes him to promulgate "reasonable rules and regulations to aid the administration or effectuation of any provisions of this Title."

Here, the Insurance Superintendent has acted to preserve the residual market mechanism and the assigned risk plan. He has done so interpreting section 2350, which gives direction, in considerable detail, regarding how the program is to be implemented. The actions of the Superintendent, far from being ultra vires, are fully consistent with his statutory obligation to implement the provisions of the insurance code and to approve a plan for a residual market mechanism. The statute specifically contemplates an assigned risk plan as an essential element of the Maine workers' compensation insurance structure. It cannot be read to allow the insurance industry to kill such a plan simply by refusing to participate in it. The argument that the plan is beyond the scope of authority of the Insurance Superintendent fails.

Part of the residual market mechanism is an accident prevention account to be created in accordance with section 2350(1). The purpose of this account is to apportion among all writers of workers' compensation insurance within the State risks which are "unable to obtain insurance on the voluntary market due to that particular employer's (a) demonstrated accident frequency problem, (b) measurably adverse loss ratio over a period of years, or (c) demonstrated attitude of non-compliance with safety requirements." The law further contemplates that these particularly bad risk or irresponsible employers may receive a subsidy through the rate structure from either other employers with safer operations or the insurance carriers, although this subsidy is to be kept as low as possible. Thus, section 2350(1)(C) specifies that:

> "The plan shall produce the least possible subsidization of the account's loss experience consistent with this chapter and sound actuarial principles. Subsidization shall be borne equally by the voluntary market and the Safety Pool based on premium amounts."

Section 2350 further provides that a participant in the accident prevent account may be assessed surcharges above regular workers' compensation premiums, section 2350(1)(F). However, no surcharges could be imposed until January 1, 1987, subsection (F)(1)(a), and premium surcharges may not exceed 10% prior to January 1, 1989, subsection (F)(1)(c). As a result of large scale abandonment of the voluntary market, this pool, originally intended for employers with special risk factors has expanded to cover a significant percentage of employers in the state.

The public purpose of the Legislature to provide a mechanism to assure availability of workers' compensation insurance at reasonable cost to all employers, even those with irresponsible safety records, is clear. It is accepted as a given for purposes of this opinion. The Legislature, not the courts, write public policy. However, implementation of that policy cannot amount to a taking, for public purposes, without just compensation. Where subsidies are provided, they must be done through the taxing or spending authority of the government, not by coercing a company to take a loss in order to subsidize another.

The combination of guaranteed workers' compensation insurance coverage and capped rates provided by sections 2350 and 2355, working together, may provide a significant disincentive for employers, particularly those in dangerous industries, to take appropriate actions to secure the safety of their premises and protect workers from injury. With both guaranteed coverage and guaranteed rates, there is little financial incentive for employers who already have the maximum adverse experi-

ence rating to prevent further escalation of injury rates. Under the Maine assigned risk system, once the rate cap is reached, as injury rates go up due to employer negligence, or for whatever reason, the workers' compensation carrier, not the employer, pays the cost for the higher injury rates. Such can work an unwilling transfer of resources from carriers to certain employers. The disincentive to safety appears directly contrary to one of the principal purposes of P.L. 1985, ch. 372 to promote increased safety of the work place. Such risk and resource transfers when they cause an inadequate rate of return amount to a taking without just compensation.

Thus, under certain circumstances, the Superintendent's Order of September 30, 1986 may result in a constitutionally invalid confiscation or taking of property for public purposes without just compensation where a carrier that has withdrawn from the voluntary market can demonstrate (a) that it cannot make a reasonable rate of return on its assigned risk or residual market workers' compensation business in Maine, or (b) that specific employer policies pose a very high likelihood of losses to the insurance company due to an irresponsible safety attitude of the employer *and* the carrier is not otherwise earning a reasonble rate of return on the Maine market.

Such a determination that a confiscation may occur does not, however, require invalidation of sections 2350 and 2355 or the September 30, 1986 Order as plaintiffs' Liberty Mutual, Home Insurance Company and Peerless Insurance Company seek in actions 86-490, 86-506 and 86-508. Instead, what this analysis demonstrates is that the Order of September 30, while facially valid, may be deficient if it does not allow a carrier that withdraws from the voluntary market (a) to decline assigned risk business if it can demonstrate that operation of the assigned risk plan will work a confiscation against the particular carrier or, alternatively, (b) to decline a particular policy assignment because of the very high likelihood that the

assignment of the risk of a particular employer will cause a loss to the carrier due to unusual safety carelessness by the particular employer where the carrier is not otherwise earning a reasonable rate of return on the Maine market.

Turning attention to the situations of Liberty Mutual Insurance Company, Peerless Insurance Company and The Home Insurance Company, the individual carriers who are plaintiffs in this action, the evidence indicates the following:

First, each carrier is no longer writing workers' compensation insurance voluntarily in the Maine market.

Second, Peerless, Home and Liberty are not earning a reasonable rate of return on their Maine workers' compensation business. In fact, Liberty and Home are both losing money on this business.

Despite these problems, none of the three carriers have initiated steps pursuant to 24-A M.R.S.A. § 415-A to withdraw from the Maine workers' compensation insurance market, and only one of the three carriers, Peerless, has even gone so far as to attempt to refuse to accept assignment of an individual policy. In supporting its refusal, Peerless did not present to the Insurance Superintendent such loss demonstrating detail as suggested in this opinion. It based its refusal on the fact that the assigned risk was not a previous client. Further, it must be emphasized that the Insurance Superintendent's November 21 response to Peerless' letter, directing them to accept the assignment or risk of reference of the matter to the Attorney General, is not under appeal to this Court. Peerless' only challenge in this action is their general challenge to the validity of the September 30, 1986, Order.

In their briefs, the carriers assert that the September 30, 1986, Order improperly preempts and is inconsistent with the withdrawal provisions of 24-A M.R.S.A. § 415-A. However, since none of the complaining carriers have at-

tempted to invoke section 415-A to withdraw from the workers' compensation market, and had their withdrawal petition rejected, they have no basis to complain regarding section 415-A.

E. *Industry-wide Confiscation*

Turning to the industry-wide confiscation case, the evidence likewise demonstrates no use of available statutory mechanisms to withdraw from the business or to do anything other than present a generalized constitutional challenge to 24-A M.R.S.A. § 2350 and 2355. On these claims, even on the evidence supplied by NCCI, it appears that the same observation can be made about the Maine workers' compensation insurance industry as can be made about many other industries: some companies are operating at a good profit, some companies are operating near the line, and some companies are losing a lot of money. Such a situation is a fact of business life in a free enterprise system, even a regulated free enterprise system.

State regulation does not guarantee a profit for every regulated company. As long as carriers who are particularly skillful, efficient, or lucky can earn an adequate rate of return under the regulated rates, and as long as some carriers are voluntarily in the market, the rates and assignments process are not constitutionally flawed on an industry wide basis, even if a greater number of carriers are earning an inadequate return or operating at a loss. Proving a general, as opposed to a company specific, compensation [sic] case is extremely difficult, if not impossible. Certainly it would have to demonstrate confiscation as to all or virtually all members of a particular industry. Here, the evidence indicates that the Maine workers' compensation insurance segment of the property casualty insurance industry is not alone in having had bad years in the early 1980s. As indicated above such a time was a bad time for property casualty insurers generally in workers' compensation and other casualty

lines. That things did not go well for many companies operating in Maine, therefore, should be no surprise.

Therefore, the general industry challenges to the constitutionality of 24-A M.R.S.A. § 2355 as a statute imposing an unconstitutional confiscation upon the Maine workers' compensation insurance industry fails.

Additionally, the industry challenge to the assignment process on the grounds that it excludes some carriers—those with less than one percent market share, and those in financially weak conditions—fails. True, there is a statutory mandate, 24-A M.R.S.A. § 2350(1)(A) & (2)(E) that all workers' compensation carriers participate in the assigned risk plan. However, the Insurance Superintendent acted within his reasonable discretion in excluding for administrative or financial stability reasons these carriers which, by his testimony, constitute, in total, only 1.8 percent of the market. Exclusion of this small portion of the market share has no significant prejudicial impact on the remaining carriers or the industry as a whole.

In its brief, the State argues that the rate reduction and increase caps imposed by § 2355 are temporary in nature, expiring in January 1989. As such, the State urges, they should be treated like other price change moratoriums which have been upheld against "taking" challenges to allow a temporary period of price stabilization or repose. However, all of the cases cited by the State involve efforts to preserve the status quo or limit price increases. None involve price reductions. None involve the period of time at issue here: rates unchanged from 1981 to 1985, rates then reduced by 8 percent from August 1985 at least to the present date, rates then allowed to increase to no more than 2 percent above the 1981-1985 level sometime in 1987 and another 10 percent in 1988. This is not stabilization or preservation of the status quo. Because of the length of time involved and the actual adverse change in economic circumstances im-

posed by law, the moratorium qualifications on the "taking" rule do not apply.

F. *Conclusion-Confiscation Claims*

Based on the above discussion, the Court determines that the provisions of 24-A M.R.S.A. § 2355 and § 2350 are valid against the carriers' general constitutional challenge. The Court further determines that the Insurance Superintendent's Order of September 30, 1986, and procedural guidelines issues thereunder are generally valid, although potentially flawed in that they do not directly include a provision to allow:

1. Withdrawal by a carrier who is demonstrably subject to losing money, or failing to earn a reasonable rate of return on assigned risk business and/or

2. Refusal or return of policies of employers with high loss potential due to specific irresponsible safety practices or demonstrated refusal to accept carrier suggestions designed to reduce losses or improve workplace safety.

3. Where the carrier is not otherwise participating voluntarily in the Maine Workers' Compensation Insurance market.

Such a procedural flaw does not, however, require granting the relief sought by the insurance carriers to enjoin operation of the September 30, 1986 Order, as no carrier has properly invoked available procedures such as 24-A M.R.S.A. § 415-A or otherwise petitioned the Insurance Superintendent for exemption from the requirements on grounds that such requirements would result in a confiscation or actual loss of money.

Under the doctrine of primary jurisdiction, it is the Insurance Superintendent, not this Court, that should be given the opportunity to make that initial determination. As no carrier has petitioned the Insurance Superintendent for surrender of their workers' compensation license or exemption from particular high risk policy

assignments, the Court will not insert itself into the process to prematurely decide matters simply because it it urged to do so and a large volume of evidence on the issues has been presented to it.

The Superintendent should have the first chance to decide the question in a real case of a § 415-A withdrawal request or a refusal to accept a policy.

Even in his letter to Peerless, the Insurance Superintendent indicated that a hearing would be available on a policy refusal and any resulting sanctions. Such should be allowed to proceed with clarification from the declarations of law on uncertain points given by this Court such as suggested in *Annable v. Board of Environmental Protection*, 507 A.2d 592 (Me. 1986).

III. *Chamber of Commerce and Public Advocate Actions*

The claims by the Public Advocate and the Chamber of Commerce and their related employers are based on the premise that the financial issues and determinations in the 8 percent proceeding should have been limited to projected savings as a result of benefit and eligibility reforms. On that assumption, they base their complaint that the Insurance Superintendent improperly considered the financial condition of the insurance industry in both the hearings and his decision in the 8 percent proceeding. However, such a position finds no support in the statute. True, savings from the benefit reforms were to be a consideration in the 8 percent case, but nothing suggests that they were to be the only consideration. Certainly, in light of the Insurance Superintendent's obligation pursuant to 24-A M.R.S.A. § 410 to assure the financial stability of all insurance companies in the insurance industry, he could not ignore issues of general financial viability in a rate setting proceeding. The Insurance Superintendent's statement to the parties regarding the scope of the hearing in his letter of August 27, 1985 is not inconsistent with 24-A M.R.S.A. § 2355(1) or any other pro-

vision of law. Accordingly, the claims presented by the Chamber of Commerce and their related parties and the Public Advocate must fail.

IV. *ORDER*

Based on the above discussion, the Court ORDERS, and the entry shall be:

1. In CV-85-459, CV-86-502 and CV-86-510; appeal DENIED. Judgment for the Defendant that the Plaintiffs are not entitled to the requested relief.

2. In CV-86-490, CV-86-506 and CV-86-508; subject to the declarations stated in this opinion, appeal DENIED, the order of the Superintendent of Insurance is affirmed. Judgment for the Defendant that the Plaintiffs are not presently entitled to relief.

/s/ Donald G. Alexander
DONALD G. ALEXANDER
Justice, Superior Court

Date: May 14, 1987

APPENDIX G

STATE OF MAINE

KENNEBEC, ss.

SUPERIOR COURT
Civil Action

Docket No. ———

NATIONAL COUNCIL ON COMPENSATION INSURANCE, an unincorporated association authorized to do business in Maine,

and

LIBERTY MUTUAL INSURANCE CO. and LIBERTY MUTUAL FIRE INSURANCE CO., corporations licensed to do business in Maine, *Plaintiffs*

vs.

SUPERINTENDENT OF INSURANCE,
Defendant

COMPLAINT AND PETITION FOR JUDICIAL REVIEW

14 M.R.S.A. § 5951
5 M.R.S.A. § 11001 et seq.
Rule 80(C), M.R.C.P.

NOW COME the Plaintiffs and allege the following:

INTRODUCTION

In this action Plaintiffs seek declaratory and injunctive relief. Plaintiffs challenge the legality and constitutionality of the Workers' Compensation insurance rate-making process administered by the Defendant Superin-

tendent of Insurance (the "Superintendent"). Plaintiff challenge specific sections of the statute which govern the rate-making process. In addition, Plaintiffs seek review of the Superintendent's Order of August 27, 1985, reducing workers' compensation insurance rates by 8%, and failing to ensure that workers' compensation rates are adequate.

PARTIES

1. Plaintiff National Council on Compensation Insurance ("NCCI"), is an insurance rating organization which is licensed by the Defendant to make and file premium rates in behalf of its member insurance companies authorized to write workers' compensation insurance in the State of Maine. Such insurance companies have authorized the Defendant, pursuant to the provisions of 24-A M.R.S.A. §§ 2302(3) and 2309, to accept filings from Plaintiff in their behalf.

2. Liberty Mutual Insurance Company and its affiliated company, Liberty Mutual Fire Insurance Company ("Liberty Mutual"), are corporations licensed to write insurance, including workers' compensation insurance, in the State of Maine. Liberty Mutual is the largest writer of workers' compensation insurance in the State of Maine. On July 24, 1985, Plaintiff, Liberty Mutual, applied for intervenor status in the hearing before the Bureau of Insurance on statutory reduction of workers' compensation rates.

3. Defendant is the Superintendent, Maine Bureau of Insurance, and in that capacity is authorized to approve or disapprove of rate filings in accordance with the authority granted to him by Chapter 25 of Title 24-A and by 39 M.R.S.A. § 22-C, subject to certain newly enacted limitations, the constitutionality of which Plaintiff is challenging.

JURISDICTION

4. On June 18, 1985, the Legislature enacted P.L. 1985, Chapter 372. Subchapter II, Section 2355, of the new statute became effective on July 1, 1985. It pur-

ports to require that all Maine workers' compensation insurance premiums be reduced, effective August 1, 1985, by at least eight percent (8%). In addition, it purports to freeze premium rates, after the 8% reduction, for the remainder of 1985 and all of 1986. Moreover, it limits rate increases in 1987 and 1988 to 10% in each year.

5. Plaintiff, NCCI, in behalf of its members, last received a rate increase in 1981. A filing for a rate increase was made in 1983 but, after hearing, an increase was denied on the grounds that Plaintiff failed to prove two elements required by 39 M.R.S.A. § 22-C as necessary to sustain a rate case. In 1984, Plaintiff made another filing. It was dismissed prior to hearing on grounds that Plaintiff had omitted from its filing some data required by Section 22-C. Only workers' compensation insurance rates are subject to the unique rate-making requirements of Section 22-C. It is a so-called "all or nothing" statute, that is, if Plaintiff fails to prove that it is entitled to the full amount of the rate increase requested, the Superintendent cannot grant any increase at all.

6. On July 5, 1985, Defendant issued a Notice of Hearing for the purpose of "promulgating rates under authority of 24-A M.R.S.A. § 2355." A pre-hearing conference was held at the offices of the Defendant on July 26 for the purpose of determining the issues to be dealt with in the hearing. Among other things, Plaintiff, NCCI, argued that Defendant had an overriding obligation to ensure that workers' compensation insurance rates were adequate notwithstanding the purported provision of Section 2355 for a reduction of at least eight percent (8%). Plaintiff requested that the scope of the hearing be enlarged for the purpose of taking evidence on the overall profitability of workers' compensation evidence in Maine. On August 27, 1985, the Defendant issued a Pre-Hearing Order which ordered Plaintiff, NCCI, and its member companies to reduce workers' compensation insurance rates by eight percent (8%). Such reduction was to be

completed by September 27, but to be made effective retroactively to August 1, 1985. Defendant further ordered that Plaintiffs be permitted to offer evidence on the overall adequacy of workers' compensation insurance rates in Maine, but only for the limited purpose of demonstrating that rates should not be reduced by *more* than eight percent (8%).

7. In summary, the Superintendent has determined that 39 M.R.S.A. § 2355 requires that the rates established by Plaintiff in behalf of its members be cut by eight percent (8%) notwithstanding the fact that rates are already unreasonably low and non-compensatory. Moreover, Section 2355 prohibits Plaintiffs from seeking a rate increase until sometime in 1987, even while, in the meantime, workers' compensation insurance is being underwritten in Maine by Liberty Mutual, and by the members of Plaintiff, NCCI, at a loss. Accordingly, Section 2355 affects the substantial rights and other legal relationships of the Plaintiff, Liberty Mutual, and the members of Plaintiff, NCCI.

8. Plaintiffs are also aggrieved by Defendant's Order of August 27, 1985, and by Defendant's failure to exercise his jurisdiction and powers, pursuant to 24-A M.R.S.A. §§ 2301 and 2303, which require the Defendant to ensure that rates are adequate, notwithstanding the provision for an eight percent (8%) initial reduction.

9. Accordingly, jurisdiction of this matter is predicated upon the Maine Declaratory Judgment Act which confers upon this Court the power to declare rights, status or other legal relations which are affected by the enactment of P.L. 1985, Chapter 372, particularly Section 2355. In addition, jurisdiction of one Count in this Complaint, in which Plaintiffs petition for judicial review, is predicated on 5 M.R.S.A. § 11001 et seq., Maine Administrative Procedure Act, and Rule 80(C), Maine Rules of Civil Procedure, for review of Defendant's action in ordering an 8% rate reduction, and in failing to enlarge the scope of the hearing in order to permit, if

supported by the evidentiary record, rates to be increased to an adequate level notwithstanding provision for an initial eight percent (8%) reduction.

COUNT I

10. All Maine employers are required to secure payment of workers' compensation benefits, 39 M.R.S.A. § 21. In most cases, employers cover this risk by providing insurance. The State of Maine has put in place a comprehensive regulatory scheme for establishing workers' compensation premium rates.

Insurers are permitted to satisfy their rate filing obligation by subscribing to, or being members of, a licensed rating organization which makes filings in their behalf. 24-A M.R.S.A. § 2309. Plaintiff, NCCI, is authorized to, and in fact does, make filings in behalf of every insurer writing workers' compensation insurance in Maine. Section 2317 of Title 24-A requires each of the members of Plaintiff, NCCI, to adhere to the rate filing made by Plaintiff, except that a member insurer may apply to the Superintendent for a deviation from such rates, which otherwise are applicable to all workers' compensation insurers collectively. Plaintiff, NCCI, makes rate filings in accordance with the provisions of 39 M.R.S.A. § 22-C, which requires that Plaintiff support said filings with a large amount of statistical data relating to the risk of underwriting workers' compensation insurance in Maine, both with respect to the results experienced by individual insurers and the aggregate results for all insurers collectively. In approving rates, Defendant must determine whether rates are just and reasonable, considering losses, expenses, efficiency, premium income, and investment income. Plaintiff, Liberty Mutual, and the members of Plaintiff, NCCI, are entitled to rates which will produce a just and reasonable return on the capital which Plaintiff's members invest to provide workers' compensation insurance in Maine. This standard is set forth in 39 M.R.S.A. § 22-C(6).

11. The Maine workers' compensation benefit system provides one of the most expensive benefit packages in the United States. Despite general inflation, and more particularly, increasing medical costs, since 1981 Plaintiffs have not received an increase in rates. In fact, during the period 1979 through 1984, Plaintiff, NCCI's, members have paid out in losses (benefits) and expenses $1.85 for each $1.00 collected in premiums.

12. During the period of August 1, 1985 to July 31, 1986, there will be an underwriting loss for the entire risk of Maine workers' compensation insurance of approximately $99,000,000.00. Approximately $1.79 will be paid out in losses and expenses during that period for each dollar of premium income.

13. If Defendant's Order to reduce rates by 8% is made effective for the one year period beginning on August 1, 1985, there will be an underwriting loss of approximately $107,000,000.00, and $1.93 in losses and expenses will be paid out for each $1.00 of premium income.

14. When expected investment income, for the period August 1, 1985 to July 31, 1986 is considered and applied to Maine underwriting results for that period, there will be an overall return on equity for the investment made by Plaintiff, NCCI's, members in Maine workers' compensation insurance of 2.94%. If Defendant's 8% reduction becomes effective, the overall return on equity will be 2.30%.

15. The return on equity for the period August 1, 1985 to July 1, 1986 is far below any reasonable standard for any business. It is confiscatory.

16. The underwriting losses and profitability levels (which include investment income) set forth above give due consideration to the savings in expenses and benefits that will be experienced as the result of amendments to Title 39 which were enacted by P.L. 1983, Chapter 479, and amendments to Title 39 enacted by P.L. 1985, Chapter 372.

17. Section 2355(2) of Title 24-A requires Plaintiff, NCCI, in behalf of its members, among which is Liberty Mutual, to reduce rates to an inadequate level without provision for hearing and consideration of the overall unprofitability of workers' compensation business in Maine. This amounts to a confiscation of the property of Plaintiff, Liberty Mutual, and of the members of Plaintiff, NCCI, without due process of law, in violation of the Constitution of the State of Maine and the Constitution of the United States.

WHEREFORE, Plaintiffs pray for a declaratory judgment declaring that Section 2355(2) is void, unconstitutional and ineffective, and without force of law; and further that Defendant be restrained and enjoined by Order of this Court from putting into effect an Order pursuant to Section 2355(2) requiring Plaintiff, NCCI's, members to reduce rates by 8%.

COUNT II

18. Plaintiffs repeat and reallege the allegations set forth in Paragraphs 1 through 17 of this Complaint as if fully set forth herein.

19. Section 2355(3) prohibits Plaintiffs from even initiating the process to demonstrate the need for a rate increase during the remainder of 1985 and all of 1986.

20. Plaintiff, Liberty Mutual, and the members of Plaintiff, NCCI, will continue to lose money during 1985 and all of 1986. Section 2355(3) prohibits them from earning a reasonable return on their investment in Maine during said period of time. This amounts to confiscation without due process in violation of the Constitutions of Maine and the United States.

WHEREFORE, Plaintiffs pray for a declaratory judgment declaring that Section 2355(3) is void, unconstitutional and ineffective, and without force of law; and that Defendant be restrained and enjoined by Order of this

Court from exercising any of the powers, rights, or duties respecting the enforcement of Section 2355(3).

COUNT III

21. Plaintiffs repeat and reallege the allegations set forth in Paragraphs 1 through 17 of this Complaint as if fully set forth herein.

22. Sections 2355(4) and 2355(5) purport to limit Plaintiff, Liberty Mutual, and the members of Plaintiff, NCCI, to a 10% increase in 1988, respectively. These provisions prohibit Defendant from giving any consideration to facts presented by Plaintiffs which demonstrate the need for an increase of greater than 10% in order to make rates just and reasonable and compensatory.

23. These sections deprive Plaintiff, Liberty Mutual, and the members of Plaintiff, NCCI, of their property without due process of law, and set an arbitrary and capricious limit on rate relief without regard to what is a just and reasonable rate.

WHEREFORE, Plaintiffs pray for a declaratory judgment declaring that Sections 2355(4) and 2355(5) are void, unconstitutional and ineffective, and without force of law; and that Defendant be restrained and enjoined by Order of this Court from exercising any of the powers, rights, or duties respecting the enforcement of Sections 2355(4) and 2355(5).

COUNT IV

24. Plaintiffs repeat and reallege the allegations set forth in Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 14 and 15 of this Complaint as if fully set forth herein.

25. In order to have authority from the Defendant to sell insurance in Maine, Plaintiff, Liberty Mutual, and the members of Plaintiff, NCCI, must comply with the financial requirements set forth in Chapter 5 of Title 24-A, particularly the minimum capital and surplus requirements set forth in Section 410.

26. A high ratio of incurred losses to premium income will adversely affect the proper financial standing which the Defendant is obliged to foster, encourage, and require pursuant to Title 24-A. Indeed, Defendant has promulgated regulations which describe standards and tests for determining financial liability of insurers. Bureau of Insurance Regulations, Chapter 230. In particular, Section 3(C)(S)(c) prescribes a loss ratio test for any insurer seeking to write workers' compensation insurance in Maine. A negative grade in the financial test is given if the loss ratio is greater than 72% plus 125% of prime rate. Currently, the aggregate of all workers' compensation business in Maine exceeds this limit by nearly double.

27. Section 22-C(1) of Title 39 provides that if Defendant has reason to believe that rates are inadequate he may "disapprove them under Title 24-A, Chapter 25." The purpose of Chapter 25 is to ensure, among other things, that rates are not inadequate. Moreover, Section 22(C)(2)(c) permits Defendant, at any time after hearing, to withdraw approval of a previously approved schedule of rates.

28. Plaintiffs requested Defendant to enlarge the scope of his hearing in order to determine rate adequacy, and to consider raising rates to an adequate level. Defendant refused to do so, choosing instead to limit the rate adequacy inquiry to only the determination of whether there should be a rate reduction of more than 8%. On August 27, 1985, Defendant ordered that workers' compensation insurance rates be reduced by 8%, retroactive to August 1, 1985, and ordered that the reduction be implemented by September 27, 1985.

29. Defendant's action is in violation of the duty imposed on him by 39 M.R.S.A. § 2301 et seq., and is contrary to his statutory obligation to ensure the financial viability of insurers doing business in Maine. In addition, Defendant's action, to the extent that it was mandated by § 2355, amounts to a confiscation of the prop-

erty of Plaintiff, Liberty Mutual, and the property of the members of Plaintiff, NCCI, without due process in violation of the Constitutions of Maine and the United States.

WHEREFORE, Plaintiffs pray that this Court reverse the Defendant's Order of August 27, 1985, reducing workers' compensation insurance rates by 8%, or in the alternative, order Defendant to grant Plaintiffs' request for an inquiry into the adequacy of workers' compensation rates and order Defendant to permit Plaintiffs to raise rates to an adequate level, if sustained by the evidence; and order such further relief as the Court deems appropriate.

DATED at Portland, Maine this 19th day of September 1985.

/s/ Harold C. Pachios
HAROLD C. PACHIOS, ESQUIRE
Attorney for Plaintiff,
National Council on
Compensation Insurance

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/s/ Kevin M. Gillis
KEVIN M. GILLIS, ESQUIRE
Attorney for Plaintiffs
Liberty Mutual Insurance Co.
and Liberty Mutual Fire
Insurance Co.

RICHARDSON, TYLER & TROUBH
465 Congress Street
Portland, ME 04101

APPENDIX H

AMERICAN INTERNATIONAL GROUP, INC. SUBSIDIARIES

Real Estate Subsidiaries:

—AIG Real Estate Investment & Managemnt Co., Inc.
—AIG Real Estate Investment & Management Co. (P.R.), Inc.
—AIG Realty, Inc.
—American International Realty Corp.
—Chiyoda Consultants Kabushiki Kaisha
—Collinsbrook Building, Inc.
—Eastgreen, Inc.
—50 South Clinton Street Urban Renewal Corporation
—Hunter Lyon, Inc.
—Kapatiran Realty Corporation
—PineStarr Realty, Inc. (formerly Davedeb Realty Corporation)
—Pine Street Brokers Corp.
—206 Sansome Street Corp.
—270 Carpenter Drive Building, Inc.

Finance Subsidiaries:

—AIA Capital Corporation
—AICCO, Inc.
—AIG Capital Corp.
—AIG Clearing Corporation
—AIG Export Investors, Inc.
—AIG Funding, Inc.
—AIG Financial Products Corp.
—AIG Financial Products (U.K.) Limited
—AIG Financial Products (Japan) Limited
—AIG Financial Securities Corp.
—AIG Financial Securities (U.K.) Limited
—AIG Global Investors, Inc.
—AIG International Limited
—AIG Investment Advisers, Inc.

—AIG Investment Corporation
—AIG Investment Corporation (Asia) Limited
—AIG Investment Corporation (Japan)
—AIG Matched Funding, Inc.
—AIG Mortgage Finance Co., Inc.
—AIG Options, Inc.
—AIG Trading Corporation
—AIG Trading Limited
—AIGOF Investments I, Inc. (formerly AIG Overseas Finance (Europe), Inc.
—AIGOF Investments II, Inc.
—AIGOF Investments III, Inc.
—AIGOF Spain Holdings, Inc.
—A.I. Credit Consumer Discount Company
—A.I. Credit Corp.
—A.I. Credit Securities Corp.
—A.I. Trade Finance, Inc.
—American International Fund Distributors, Inc.
—Banque A.I.G.
—Eurinvest Finance, S.A.
—International Lease Finance Corporation
—Law, Dempsey & Company, Limited
—Pine Street Holdings, Inc.
—Trading & Transportation Management, Inc.

Other Subsidiaries:

—Agency Management Corporation
—A.I. Lloyds, Inc.
—A.I. Lloyds' Insurance Company
—A.I. Marine Adjusters, Inc.
—A.I. Marine Associates of Illinois, Inc.
—A.I. Network Corporation
—AIG Aviation, Inc.
—AIG Aviation (Canada), Inc.
—AIG Aviation (Illinois) Corporation
—AIG Aviation (Texas), Inc.
—AIG Aviation Adjustment Service, Inc.
—AIG Aviation Brokerage, Inc.

—AIG Consultants, Inc.
—AIG Consultants (UK) Ltd.
—AIG Equipment Lessors, Inc.
—AIG Hawaii Insurance Company, Inc.
—AIG Life Insurance Company
—AIG Managing General Agency, Inc.
—AIG Marketing, Inc.
—AIG Overseas Trade Corp.
—AIG Research & Development Corp.
—AIG Risk Management, Inc.
—AIG Risk Management (Illinois), Inc.
—AIG Syndicate Managers, Inc.
—AIG Trade Corp.
—AIGM Insurance Service, Inc.
—AIU Canada Limited
—AIU Insurance Company
—ALICO, S.A.
—Agency Management Corporation
—Agency Management Corporation of Arkansas
—American Fidelity Company
—American Global Insurance Company
—American Home Assurance Company
—American International Adjustment Company, Inc.
—American International Adjustment Co. of Illinois, Inc.
—American International Adjustment Company of Nevada, Inc.
—American International Assistance Services, Inc.
—American International Assurance Company (Bermuda) Limited
—American International Assurance Company, Limited
—American International Aviation Corporation
—American International Company, Limited
—American International Corporation
—American International Global, Inc.
—American International Global of Colorado, Inc.
—American International Global (Connecticut), Inc.

—American International Global of Illinois, Inc.
—American International Global of Louisiana, Inc.
—American International Global of Massachusetts Insurance Agency, Inc.
—American International Global of New Jersey, Inc.
—American International Global of North Carolina, Inc.
—American International Global of Texas, Inc.
—American International Global Emergency Services, Inc.
—American International Group Data Center, Inc.
—American International Health & Rehabilitation Services, Inc.
—American International Healthcare, Inc.
—American International Insurance Company
—American International Life Assurance Company of New York
—American International Life Insurance Company of Puerto Rico
—American International Marketing Systems, Inc.
—American International Oil & Gas Corp.
—American International Recovery, Inc.
—American International Reinsurance Company, Limited
—American International Services, Inc.
—American International Surplus Lines Agency, Inc.
—American International Surplus Lines Insurance Company (formerly Alaska Insurance Company)
—American International Underwriters Agency Corporation of Texas, Inc.
—American International Underwriters Agency, Inc. (Illinois)
—American International Underwriters Agency, Inc. (Missouri)
—American International Underwriters Agency of Ohio, Inc.
—American International Underwriters Corporation
—American International Underwriters of Louisiana, Inc.

—American International Underwriters Overseas, Ltd.
—American International Underwriters (West Coast) Inc.
—American Life Insurance Company
—Birmingham Fire Insurance Company of Pennsylvania
—C.A. Servicios de Propiedades
—Central Risk Specialists, Inc.
—Commerce and Industry Insurance Company
—Commerce and Industry Insurance Company of Canada
—Delaware American Life Insurance Company
—Dwight Tope State Agency, Inc.
—Eastern Risk Specialists, Inc.
—Florida Risk Specialists, Inc.
—Granite State Insurance Company
—The Gulf Agency, Inc.
—Hawaii Insurance Consultants, Ltd.
—Hawaii Risk Specialists, Inc.
—Illinois National Insurance Company
—The Insurance Company of the State of Pennsylvania
—International Computer Services, Inc.
—JBI Management, Inc.
—JBI Management of Illinois, Inc.
—La Interamericana Compania de Seguros Generales (Columbia)
—La Interamericana Compania de Seguros Generales (Chile)
—La Interamericana Compania de Seguros de Vida (Chile)
—La Meridional Compania Argentina de Seguros Sociedad Anonima
—Landmark Insurance Company
—Landmark Insurance Company (U.K.), Ltd.
—Lexington Insurance Company
—Louisiana Risk Specialists, Inc.
—Malaysian American Assurance Company Berhad
—Marketpac International, Inc.

—MetaMicro Computer Consulting, Inc.
—Michigan Risk Specialists, Inc.
—Midwestern Risk Specialists, Inc.
—Morefar Marketing, Inc.
—Mt. Mansfield Company, Inc.
—NAM, Inc.
—NAM, Inc. (Massachusetts)
—NAM Managers, Ltd.
—N.A.M. Managing General Agency, Inc.
—Nan Shan Life Insurance Company, Ltd.
—National Union Fire Insurace Company of Pittsburgh, Pa.
—National Union Fire Insurance Company of Louisiana
—New England Risk Specialists, Inc.
—New Hampshire Indemnity Company, Inc.
—New Hampshire Insurance Company
—New Hampshire Life Insurance Company
—NHIG Holding Corp.
—Norgulf, Inc.
—North American Managers, Inc.
—Northeastern Risk Specialists, Inc.
—Northwestern Risk Specialists, Inc.
—Pacific Union Assurance Company
—Pennsylvania Brokerage Agency, Inc.
—Philam Insurance Company, Inc.
—The Philippine American Assurance Company, Inc.
—The Philippine American General Insurance Company, Inc.
—The Philippine American Life Insurance Company
—The Philippine American Management and Financing Company, Inc.
—Pine Street Management Corp.
—Reciprocal Managers, Inc.
—Risk Specialists Companies, Inc.
—Risk Specialists Company of the Carolinas, Inc.
—Risk Specialists Company of Colorado, Inc.
—Risk Specialists Company of Connecticut, Inc.

—Risk Specialists Company of Indiana, Inc.
—Risk Specialists Company of Maryland, Inc.
—Risk Specialists Company of Minnesota, Inc.
—Risk Specialists Company of New Jersey, Inc.
—Risk Specialists Company of New York, Inc.
—Risk Specialists Company of Ohio, Inc.
—Risk Specialists Company of Tennessee, Inc.
—Risk Specialists Company of Wisconsin, Inc.
—Southern Risk Specialists of Oklahoma, Inc.
—Southeastern Risk Specialists, Inc.
—Southern Risk Specialists, Inc.
—UNAT, S.A.
—Ueberseebank A.G.
—United Guaranty Commercial Insurance Company
—United Guaranty Commercial Insurance Company of North Carolina
—United Guaranty Corporation
—United Guaranty Credit Insurance Company
—United Guaranty Residential Insurance Company
—United Guaranty Residential Insurance Company of North Carolina
—United Guaranty Services, Inc.
—Western Risk Specialists, Inc.

Affiliates:

—A.B. Asesores Bursatiles, S.A.
—American International Underwriters Association
—American International Underwriters Overseas Association
—Goodwood Oil Corporation
—Pine Street Investments, Ltd.
—Pine Street Partners
—Transatlantic Holdings, Inc.
—Putnam Reinsurance Company
—Transatlantic Reinsurance Company

(2)

No. 91-1563

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

AIU INSURANCE COMPANY, AMERICAN FIDELITY COMPANY, AMERICAN HOME ASSURANCE COMPANY, BIRMINGHAM FIRE INSURANCE COMPANY OF PENNSYLVANIA, COMMERCE AND INDUSTRY INSURANCE COMPANY, GRANITE STATE INSURANCE COMPANY, INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., NEW HAMPSHIRE INDEMNITY COMPANY, INC., and NEW HAMPSHIRE INSURANCE COMPANY,

Petitioners,

v.

SUPERINTENDENT, MAINE BUREAU OF INSURANCE,

Respondent.

Petition For A Writ Of Certiorari To The Maine Supreme Judicial Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether it violated due process for a state court to hold that *res judicata* could be applied to parties who were in privity with a litigant in a prior action.

2. Whether it violated due process for a state court to hold that parties who did not seek timely judicial review of an administrative order were precluded from challenging that order in a subsequent action.

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No. 91-1563

In The

Supreme Court of the United States

October Term, 1991

AIU INSURANCE COMPANY, AMERICAN FIDELITY COMPANY, AMERICAN HOME ASSURANCE COMPANY, BIRMINGHAM FIRE INSURANCE COMPANY OF PENNSYLVANIA, COMMERCE AND INDUSTRY INSURANCE COMPANY, GRANITE STATE INSURANCE COMPANY, INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., NEW HAMPSHIRE INDEMNITY COMPANY, INC., and NEW HAMPSHIRE INSURANCE COMPANY,

Petitioners,

v.

SUPERINTENDENT, MAINE BUREAU OF INSURANCE,

Respondent.

Petition For A Writ Of Certiorari To The Maine Supreme Judicial Court

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Richard E. Johnson, Acting Superintendent of the Maine Bureau of Insurance, respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the opinion of the Maine

Supreme Judicial Court issued on December 31, 1991 and reported at 600 A.2d 1115 (Me. 1991) (App. 2a-8a).[1]

STATEMENT OF THE CASE

Because petitioners' statement of facts is incomplete and inaccurate in significant respects, the Superintendent provides the following statement of material facts:[2]

This lawsuit involves a challenge to workers' compensation legislation enacted in the State of Maine in 1985. The legislation in question, 1985 Maine Acts, ch. 372 ("the 1985 Act"), mandated significant reductions in the benefits to be paid to injured employees and required offsetting cuts in insurance rates as part of a transition period to a system under which insurers would be able to set their own rates.

Prior to the 1985 Act, workers' compensation rates in Maine resulted from a process whereby rate proposals were submitted by the National Council on Compensation Insurance ("NCCI") on behalf of its member-insurers, and those proposed rates were either approved

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[1] References to "App. ___" are to the pages of the Appendix included with the Petition for a Writ of Certiorari.

[2] To the extent that these facts are not contained in the Appendix to the Petition, they are contained in the Affidavit of Richard Johnson of the Maine Bureau of Insurance, which was sworn to on May 31, 1990 and submitted in support of the Superintendent's Motion to Dismiss or for Summary Judgment filed in the Maine Superior Court on June 1, 1990. None of the facts contained in this affidavit were controverted by petitioners.

or disapproved by the Superintendent.[3] NCCI is a nationwide organization of workers' compensation insurers to which petitioners have belonged at all relevant times. NCCI is authorized in Maine to file workers' compensation rate proposals on behalf of its member insurers and is entitled to bring court challenges to rate orders issued by the Superintendent. *See* 24-A Me.Rev.Stat.Ann. §§ 2309-10 (Supp. 1991); *id.* § 236 (1990); *NCCI v. Superintendent of Insurance*, 481 A.2d 775 (Me. 1984) (*"NCCI 1"*).[4]

In 1980 NCCI filed for a rate increase, which was approved. In the next three years NCCI sought further rate increases, all of which were disapproved, principally because of NCCI's failure to provide required information consisting of the projected investment income of

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[3] At that time the Superintendent had no authority to modify a filing but was required either to approve or disapprove proposed rates in their entirety. *See NCCI v. Superintendent of Insurance*, 481 A.2d 775, 781 (Me. 1984). In the 1985 Act, the Superintendent was given authority to approve a rate increase in an amount other than the amount requested. 1985 Maine Acts, ch. 372, Part B, § 8, *enacting* 39 Me.Rev.Stat.Ann. § 22-D(7) (repealed 1988 and replaced by 24-A Me.Rev.Stat.Ann. § 2363 (1990)).

[4] The 1985 Act did not alter NCCI's role with respect to the assigned risk pool but made several changes in NCCI's role with respect to rate rulings in the voluntary market, eliminating joint rate filings while continuing to authorize NCCI to file certain essential rate data. These changes are not material to the issues in this case since they were not made effective until January 1, 1986 – after NCCI brought the lawsuit which formed the basis for the Superintendent's *res judicata* defense in the instant case.

NCCI's member insurers under its proposed rates. *See NCCI 1*, 481 A.2d at 778-80, which rejected NCCI's challenge to the Superintendent's order disapproving NCCI's 1982 rate filing. NCCI did not seek judicial review of the Superintendent's orders disapproving its rate filings in 1981 and 1983, and NCCI did not file for any rate increases in either 1984 or 1985. Although workers' compensation *rates* thus held steady for several years, the total amount of premium income received by insurers continued to increase because workers' compensation rates are applied as a percentage of payroll, and overall payrolls increased in Maine from 1981 to 1985.

The 1985 Act, which was enacted on June 18, 1985, was designed to respond to perceived problems in the workers' compensation system. The Act contained three major elements. The first element involved cuts in the benefits to be paid to injured employees, including (1) a three year freeze of the maximum weekly benefit; (2) a cap on the annual inflation adjustment; (3) limitation of certain benefits to two-thirds of the average weekly wage regardless of the claimant's actual wage; (4) a requirement that weekly wage benefits be reduced by 50% of social security benefits and by after tax benefits received from certain employee benefit plans; (5) restriction of attorneys' fee awards to claimants; and (6) amendment of certain procedural rules that were perceived as being too favorable to claimants. 1985 Maine Acts, ch. 372, Part A, §§ 15, 17, 19-21, 25-26, 34, 43, 45.

The second element of the 1985 Act involved the establishment of safety and rehabilitation programs designed to reduce the amount paid out in benefits to workers compensation claimants. *Id.* §§ 6-7, 23, 29. Like

the Act's statutory cuts in benefits, therefore, the safety and health programs were intended to reduce the amounts which workers' compensation insurers in Maine were required to pay.

The third element of the 1985 Act involved the phased deregulation of workers' compensation rates over a three-year period. 1985 Maine Acts, ch. 372, Part B, § 5. Beginning in 1989 insurers would generally be able to set their own rates in the voluntary market on a "use and file" basis, subject to limited review by the Superintendent after the rates were in effect. 24-A Me.Rev.Stat.Ann. § 2338 (Supp. 1986) (repealed 1987). Rates in the assigned risk pool would continue to be subject to prior approval by the Superintendent. During the transition period, in order to reflect the rate effect of the statutory cuts in benefits described above, rates were required to be reduced by at least 8% for the period from August 1, 1985 to the end of 1986. In addition, rate increases during 1987 and 1988 were limited to 10% each year. 24-A Me.Rev.Stat.Ann. § 2355 (Supp. 1986) (repealed 1987).

In August of 1985 the Superintendent issued an interim order implementing the 8% rate reduction required by the transition provisions of the 1985 Act effective as of August 1, 1985. (App. 56a).[5] NCCI and Liberty Mutual Insurance Company thereafter filed a lawsuit in Maine Superior Court claiming that, notwithstanding the offsetting cuts in benefits, the statutory 8% reduction for 1985 and the 10% limitation on rate

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[5] Contrary to petitioners' contentions (Petition at 4), neither the 1985 Act nor the Superintendent's interim order made the 8 percent reduction retroactive to January 1, 1985.

increases for 1987 and 1988 were confiscatory and unconstitutional. *NCCI v. Superintendent of Insurance*, Docket No. CV-85-459 (Maine Superior Court, Kennebec County, filed September 20, 1985) ("*NCCI 2*"). NCCI's complaint sought declaratory and injunctive relief against the rate limitations in the 1985 Act. (*See* App. 98a-99a). At the outset, NCCI sought a preliminary injunction against the 8% reduction mandated as of August 1, 1985 by the 1985 Act and the Superintendent's interim order, but this request was denied in a ruling from which no appeal was sought.[6] (App. 56a).

NCCI thereafter held its lawsuit in abeyance pending administrative hearings to determine whether a rate reduction in excess of 8% would be appropriate in view of the statutory cuts in benefits. (*See* App. 56a). After the Superintendent issued a decision in October 1986 ruling that the reduction would be limited to 8%, an eight-day trial was held before the Maine Superior Court on NCCI's challenges to the rate limitations contained in the 1985 Act and on related appeals from orders entered by the Superintendent in connection with those rate limitations and in connection with the operation of the assigned risk pool. By this time challenges brought by several individual insurers had been consolidated with the NCCI lawsuit.

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[6] Although there is no automatic right to appeal from the denial of a preliminary injunction in Maine, an appeal may be taken if it can be shown that sufficiently irreparable harm will ensue or if there are other policy reasons favoring review. *E.g., Moffett v. City of Portland*, 400 A.2d 340, 343 (Me. 1979); *Bar Harbor Banking & Trust Co. v. Alexander*, 411 A.2d 74, 76-77 (Me. 1980).

On May 14, 1987, the Maine Superior Court affirmed the Superintendent's August 1985 interim order and entered a declaratory judgment that the 1985 Act was constitutional. (App. 50a-91a). Like the Superintendent, the Superior Court found that the benefit reductions mandated by the 1985 Act exceeded the 8% reduction in rates so that the net effect of the new rates was the equivalent of a rate increase. (App. 70a-71a).[7] The Superior Court also affirmed the Superintendent's finding that the rates, although projected to yield a below market return, would nevertheless allow workers compensation insurers to operate at an expected profit. (App. 69a, 74a-75a).

Because the insurers' expected profit under the transitional provisions imposed by the 1985 Act fell below market rates, the Superior Court found that the rates of return available to insurers fell below the range that would constitute a reasonable rate of return. (App. 74a). Nevertheless, the Superior Court held that there was no unconstitutional confiscation because state regulation does not guarantee a profit for every insurance company, because insurers could freely withdraw from the voluntary market, and because the rates under the transitional provisions of the 1985 Act did not lead to results that were materially worse than those experienced by the property and casualty insurance industry as a whole. (App. 87a-88a).

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[7] This demonstrates the misleading nature of petitioners' repeated characterizations of the 1985 Act as a rate "rollback." *E.g.*, Petition at 2-4.

With respect to the insurers' complaints about the assigned risk pool, the court found no unconstitutional confiscation as long as the insurers in that pool could withdraw from the Maine market. (App. 79a-80a, 85a-86a, 89a). The court further found that since none of the complaining insurers had ever initiated steps to withdraw from the Maine workers' compensation insurance market, they were not in any position to complain that they were not free to exercise their right to withdraw pursuant to 24-A Me.Rev.Stat.Ann. § 415-A (1990). (App. 86a-87a, 89a).

Five months later, in October of 1987, the ten affiliated companies who are the petitioners in this case filed withdrawal plans with the Superintendent. All of these plans were approved within one day, effective on December 31, 1987.

In the meantime, NCCI appealed the Superior Court's decision in *NCCI 2* to the Maine Supreme Judicial Court. While that appeal was pending, the challenged provisions of the 1985 Act were repealed. 1987 Maine Acts, ch. 559, § 3. Because NCCI had sought only prospective relief enjoining the rate limitations in the 1985 Act, the Maine Supreme Judicial Court dismissed NCCI's appeal as moot. *NCCI v. Superintendent of Insurance*, 538 A.2d 759 (Me. 1988).[8]

Sixteen months later, in July 1989, petitioners commenced the instant lawsuit, repeating NCCI's allegations that the transitional rate limitations were confiscatory but

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[8] A copy of this decision, mislabeled as a decision of the Superior Court, appears in Petitioner's Appendix at 39a-49a.

this time asking for retroactive monetary damages in excess of $50 million from the Superintendent. In response, the Superintendent argued that a regulated entity subjected to an allegedly confiscatory rate did not have a cause of action for retroactive monetary damages against the ratemaker; its remedies were limited to prospective relief and relief within the context of ratemaking.[9] Alternatively, the Superintendent raised a *res judicata* defense based, *inter alia*, on the litigation in *NCCI 2* and the existence of privity between NCCI and petitioners.

The Superintendent thereafter filed a motion to dismiss or in the alternative for summary judgment based on petitioners' failure to state a claim and on *res judicata*. On January 2, 1991, the Maine Superior Court granted the Superintendent's motion. It stated that it was unaware of any decision in any jurisdiction which had held that persons in a regulated industry could bring a cause of action for monetary damages against a public ratemaking authority. (App. 12a). Nevertheless, it ultimately bypassed that issue and ruled that petitioners had in any event failed to state a cognizable claim under the takings clause. (App. 14a-27a). In the course of its decision, the court stated that it did not find *res judicata* to be applicable. (App. 12a-13a).

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[9] Thus, the Superintendent argued that while a regulated entity is entitled to prompt judicial review of any ratemaking order and might be entitled, in a proper case, to future rate relief to remedy past confiscation (if such were proven), it could not wait four years after a rate goes into effect and then sue for compensatory damages as petitioners had attempted to do in this case.

On appeal, the Maine Supreme Judicial Court also bypassed the issue of whether regulated industries can assert a cause of action for monetary damages against a ratemaker. It assumed, without deciding, that such a cause of action existed (App. 6a), but disagreed with the Superior Court and ruled that petitioners' claims were barred by *res judicata*. (App. 3a, 5a-8a).

REASONS WHY THE PETITION SHOULD BE DENIED

At the outset, because of the manner in which petitioners have attempted to frame the issues in this case, two points should be made. First, petitioners are complaining about ratemaking – a process which this Court has noted is far from an exact science. *See Duquesne Light Co. v. Barasch*, 488 U.S. 299, 308 (1989), *quoting Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968) ("[N]either law nor economics has yet devised generally accepted standards for the evaluation of rate-making orders"). Moreover, rates are not necessarily invalid even though they may produce only a "meager return." *Duquesne Light Co. v. Barasch*, 488 U.S. at 310, *quoting FPC v. Hope Natural Gas*, 320 U.S. 591, 605 (1944). Under the transitional provisions of the 1985 Act both the Superintendent and the Maine Superior Court found that insurers would receive the equivalent of a modest rate increase. Although petitioners, like NCCI before them, complain that this increase was inadequate, such a claim does not – contrary to petitioners' assumption – automatically translate into an unconstitutional taking and certainly does not present the massive injustice portrayed by petitioners.

Second, the Superintendent has consistently maintained throughout this litigation that regulated entities have no cause of action for monetary damages against a ratemaker based on allegedly confiscatory rates. Indeed, petitioners have never cited a single case involving ratemaking in which any court has held that a ratemaker can be held accountable in damages for a confiscatory rate. If retroactive damage claims such as those asserted in this case were allowed, the threat of such claims would be prohibitive – particularly under petitioners' theory that regulated entities can bring suit years after the challenged rates go into effect for what they now describe as "hundreds of millions of dollars." (Petition at 15). If such a cause of action were allowed, it would eliminate ratesetting by governmental entities. For this reason, the relevant judicial decisions have always recognized that "just compensation" in the context of rate-setting means an adequate rate, not monetary damages. *See Duquesne Light Co. v. Barasch*, 488 U.S. at 308. This means that regulated entities are entitled to seek relief setting aside constitutionally deficient rates. In an appropriate case, they might also be entitled to future rate relief to remedy the effects of past confiscation, but they may not seek to hold the ratemaker liable for damages.

Because the Maine Supreme Judicial Court did not rule on this issue, resting its decision instead upon *res judicata*, the issue of whether a cause of action for monetary damages can be asserted against a ratemaker is not before this Court.[10] In the discussion that follows, however,

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[10] However, the above discussion demonstrates the fallacy of petitioners' contention (Petition at 13) that the decision

(Continued on following page)

it should be emphasized that the Superintendent does not concede that any such cause of action exists.

Turning to the *res judicata* issue upon which the decision below was based, the Superintendent is obliged to point out that it is questionable whether petitioners adequately raised the federal issue on which they now seek review. Notwithstanding Sup. Ct. Rule 14.1(h), petitioners have not specified when and how the federal question presented by their petition was raised in the courts below. In fact, although petitioners concede that the Superintendent raised a *res judicata* defense from the outset of the case (Petition at 7), petitioners never suggested in the trial court that the doctrine of *res judicata* could not constitutionally be applied to their claims but argued only that the doctrine was inapplicable in this case. On appeal, petitioners' only reference to any alleged due process problem with the application of *res judicata* was contained in a single sentence of the reply brief that they filed on June 7, 1991 in the Maine Supreme Judicial Court.[11] Under these circumstances, it is not surprising

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below thwarts this Court's ruling in *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987). *First English* was not a ratesetting case. Moreover, no *res judicata* issue was raised in *First English*. As a result, *First English* is in no way inconsistent with the decision of the Maine Supreme Judicial Court in this case.

[11] That sentence appeared at the conclusion of an argument that claim preclusion was inapplicable. After arguing that

(Continued on following page)

that the Maine Supreme Judicial Court did not address the constitutional argument upon which petitioners now seek review.

Even assuming for the sake of argument, however, that petitioners adequately raised their due process objection, their petition should be denied because, as discussed in more detail below, (1) the opinion on which the petition is based, *Martin v. Wilks*, 490 U.S. 755 (1989), was based on an interpretation of the Federal Rules of Civil Procedure rather than due process; (2) in any event, there is no inconsistency between the decision below and *Wilks;* and (3) the decision below is based on an adequate and independent state ground.

1. This Court's decision in Martin v. Wilks was based upon an interpretation of the Federal Rules of Civil Procedure.

The sole basis upon which petitioners seek review is an alleged inconsistency between the decision below and this Court's opinion in *Martin v. Wilks*, 490 U.S. 755

(Continued from previous page)

NCCI could not have sued for damages on their behalf, petitioners stated, "it would therefore deprive appellants of their right to due process to bind them as the result of NCCI's failure to assert a damages claim on their behalf." Appellants' Reply Brief dated June 7, 1991, at 18. This was followed by a citation to *UAW v. Brock*, 477 U.S. 274, 290 (1986) and a footnote which read, "Assuming that appellants *could* have intervened in *NCCI*, they had no obligation to do so. *See Martin v. Wilks*, 490 U.S. 755, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989)." Appellants' Reply Brief dated June 7, 1991, at 18 n.11 (emphasis in original).

(1989). Although petitioners argue that the *Wilks* opinion was based on the due process clause, the text of the *Wilks* decision demonstrates that it rests instead upon an interpretation of Rules 19 and 24 of the Federal Rules of Civil Procedure. *See, e.g.*, 490 U.S. at 763-65. Indeed, the Court expressly noted that acceptance of the policy arguments made by the petitioners in *Wilks* "would require a rewriting . . . of the relevant Rules." *Id.* at 767. Commentators have agreed that the principle enunciated in *Wilks* can be altered by rule or legislation. *See* 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4452 (Supp. 1992) at 285-86. Indeed, Congress has altered the *Wilks* rule with respect to employment discrimination cases in the Civil Rights Act of 1991. Pub.L.No. 102-166, 105 Stat. 1071 § 108 (1991), enacting 42 U.S.C. § 2000e-2(n).

As a result, even assuming that there were some inconsistency between the decision below and *Wilks*, this would not demonstrate any constitutional infirmity in the decision below. As discussed immediately below, however, the Maine Supreme Judicial Court's decision in this case is entirely consistent with the decision in *Wilks*.

2. The decision below is not inconsistent with *Martin v. Wilks*.

In *Martin v. Wilks* there was an express finding in the court below that the white firefighters were neither parties nor privies to the consent decrees which they were seeking to challenge. *See* 490 U.S. at 761. Moreover, the *Wilks* decision expressly recognized that the rule which it enunciated – that a person is not barred by a judgment

entered in litigation to which he or she was not a party – would not apply if the party sought to be bound was in privity with a prior litigant. Thus, the Court, quoting Justice Brandeis in *Chase National Bank v. Norwalk*, 291 U.S. 431, 441 (1934), expressed the general principle underlying its decision in the following terms: "Unless duly summoned to appear in a legal proceeding, a person *not a privy* may rest assured that a judgment recovered therein will not affect his legal rights." 490 U.S. at 763 (emphasis added). *See also* 490 U.S. at 762 n.2.

In the instant case, as the Maine Supreme Judicial Court noted, "it is uncontested that the insurers [petitioners AIU *et al.*] are in privity with the National Council on Compensation Insurance with respect to the litigation in *NCCI 2*." (App. 5a).[12] On the face of the decision below, therefore, there is no inconsistency with *Martin v. Wilks* since the instant case falls into the express exception recognized in *Wilks* for parties who are in privity with a prior litigant.

Moreover, the Maine Supreme Judicial Court cannot be faulted for finding privity to be uncontested in this case because the existence of privity is amply demonstrated by petitioners' own admissions in the Superior Court. The papers filed by petitioners in the Superior Court stated, in referring to *NCCI 2*, that " . . . plaintiffs concede that their interests were represented by NCCI, an

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[12] The Superior Court also concluded that petitioners were in privity with NCCI. (App. 12a).

association to which plaintiffs belong . . . "[13] In responding to another of the Superintendent's arguments, petitioners went even further, stating that "plaintiffs communicated their opposition to the 1985 Act rate levels by *their participation* in the *NCCI 2* litigation which was filed immediately after [the Superintendent] entered his 8 percent rollback order."[14] Given petitioners' candid acknowledgement below that they participated in the *NCCI 2* litigation, they cannot now attack the existence of privity in this Court.

This also disposes of petitioners' newly-minted suggestion that it was never alleged or proven that petitioners had notice of the NCCI litigation (Petition at 11). It is disingenuous for petitioners to intimate in this Court that they did not have notice of *NCCI 2* when they acknowledged their "participation" in that case in their papers below. Moreover, petitioners never in any manner raised any issue with respect to notice in the proceedings below. If petitioners wished to object to the application of *res judicata* based on the Superintendent's failure to plead

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[13] Plaintiffs' Memorandum in Response to Motion to Dismiss or For Summary Judgment, dated July 25, 1990 and filed in *AIU Insurance Co., et al. v. Superintendent of Insurance*, Superior Court Cumberland County, Docket No. CV-89-963, at 17 n.11. Petitioners went on to contend that although their interests were represented by NCCI, they were not raising the same claim litigated in *NCCI 2* and their claims could not have been litigated in that proceeding.

[14] Plaintiffs' Memorandum in Response to Motion to Dismiss or For Summary Judgment, dated July 25, 1990, at 29 (emphasis added).

and prove that they had notice of *NCCI 2*,[15] it was incumbent on petitioners to raise this issue in the courts below. They are not entitled to raise this issue for the first time in their petition for certiorari. *E.g., Webb v. Webb*, 451 U.S. 493, 495, 498-501 (1981).

In sum, this case squarely falls within the privity exception recognized in *Wilks*. The crucial difference between this case and *Wilks* is that, while the white firefighters in *Wilks* had not been represented by any party during the proceedings which led to the consent decrees, the petitioners in this case were directly represented by an industry association whose entire reason for being was to provide such representation. In finding *res judicata* based on privity under these circumstances, the decision below is entirely consistent with federal decisions that have found that prior litigation brought by trade associations and labor unions precludes subsequent claims by members of those associations. *E.g., Utah Power & Light Co. v. ICC*, 764 F.2d 865, 871 (D.C. Cir. 1985); *Panza v. Armco Steel Corp.*, 316 F.2d 69 (3d Cir. 1963), *cert. denied*, 375 U.S. 897 (1963).

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[15] Petitioners' arguments on this issue are carefully worded. They never directly contend that they did not have notice of the NCCI lawsuit, but only that the Superintendent never alleged such notice (Petition at 7) and they therefore state that there is "no basis . . . for concluding" that they were aware of the NCCI litigation (Petition at 11).

3. The decision below rests upon an adequate and independent state ground.

It is well-settled that, subject to the due process clause, state courts are entitled to determine for themselves the *res judicata* effects of their own judgments. *Parsons Steel Inc. v. First Alabama Bank*, 474 U.S. 518, 523 (1986); *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 82 (1984). Thus, application of *res judicata* is a matter of state law, and the decision of the Maine Supreme Judicial Court in this case determining the *res judicata* effect of the state court proceedings in *NCCI 2* rests upon an adequate and independent state ground that forecloses review by this Court. *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935).

While state court interpretations of *res judicata* cannot violate due process, *Parsons Steel*, 474 U.S. at 523, petitioners' only suggestion that there was a violation of due process in the instant case is a claim that, as noted above, rests upon two demonstrably false premises – (1) that the result in *Martin v. Wilks* was dictated by due process instead of by this Court's interpretation of the federal rules of civil procedure, and (2) that the decision below is inconsistent with *Wilks*. The short answer to petitioners' arguments is that there is no violation of due process when preclusive effect is given to prior litigation conducted by an association whose only role is to represent its members and who specifically undertook the prior litigation for precisely that purpose. *See Nevada v. United States*, 463 U.S. 110, 135 (1983); *Hansberry v. Lee*, 311 U.S. 32, 41-43 (1940).

Petitioners' remaining contentions may be briefly disposed of. While they contend that NCCI only brought

a facial challenge to the constitutionality of the 1985 Act – allegedly leaving open a later attack on the Act as applied (Petition at 12-13) – this argument is belied by the fact that the Superior Court in *NCCI 2* conducted an eight-day trial and heard considerable evidence, including expert testimony from both sides, on the specific application of the 1985 Act to insurers writing workers' compensation insurance in Maine. (*See, e.g.*, App. 68a-75a). The NCCI litigation thus went far beyond a mere facial challenge to the 1985 Act. Moreover, even assuming that only a facial challenge had been brought would not alter the application of *res judicata* in this case since, under Maine law as well as under federal law, claim preclusion applies both to the claims that were previously brought and any claims that could have been brought. *See Currier v. Cyr*, 570 A.2d 1205, 1208-09 (Me. 1990).

Plaintiffs also suggest that some significance should be attached to the difference between an industry-wide claim of confiscation and a company-specific claim. (Petition at 12). This demonstrates a fundamental misunderstanding of rate-making in the context of insurance. In setting rates, the Superintendent was not obliged to set separate rates for each individual insurer so as to guarantee each insurer, no matter how inefficient, a reasonable rate of return. *See Aetna Insurance Co. v. Hyde*, 275 U.S. 440, 447 (1928) ("It has never been and cannot reasonably be held that state made rates violate the Fourteenth Amendment merely because the aggregate collections are not sufficient to yield a reasonable profit or just compensation to all companies that happen to be engaged in the affected business"). At most, assuming that the doctrine

of confiscatory rate regulation applicable to public utilities is also applicable to insurance companies,[16] the Superintendent was obliged to set a single rate, applicable to all insurers and generally sufficient to provide them with an *opportunity* to earn a fair rate of return. *See Duquesne Light Co. v. Barasch*, 488 U.S. at 310. As a result, any challenge to the rates set for insurers must necessarily consider the industry as a whole.

Petitioners also argue that the doctrine of *res judicata* is inapplicable to their claims because they contend that, under *Warth v. Seldin*, 422 U.S. 490 (1975), NCCI did not have standing to sue for damages on behalf of its members.

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[16] Although many courts have assumed that the same doctrine of confiscatory rate regulation applicable to public utilities is also applicable to rate regulation in the context of insurance, the Superintendent does not concede that this assumption is correct. As the Superior Court noted in *NCCI 2*, insurance companies differ from public utilities in that they can withdraw from a jurisdiction without leaving "useless wires in the air, pipes in the ground, or power plants on the land." (App. 80a). If insurers can voluntarily withdraw from a jurisdiction to avoid rates they perceive as inadequate, it is hard to see how there could be any confiscation, since it cannot be argued that insurers have a right to sell insurance in any given jurisdiction. *See California State Automobile Association v. Maloney*, 341 U.S. 105, 110 (1951) ("the power of the state is broad enough to take over the whole business [of insurance], leaving no part for private enterprise").

This issue is not before this Court because the Maine Supreme Judicial Court declined to reach it and instead rested its decision upon *res judicata*.

(Petition at 11).[17] In making this argument, petitioners simply ignore the ruling of the court below – which pointed out that if petitioners' claims of individualized injury were distinct from NCCI's challenge on behalf of its members as a class, then petitioners' claims were barred by the doctrine of administrative *res judicata* because they let the Superintendent's orders become final and did not file timely challenges to those orders on their own behalf. (App. 7a). This principle, based on Restatement (Second) of Judgments § 83 (1982), is well-settled under Maine law and has been applied in a variety of contexts. *E.g., Maines v. Secretary of State,* 493 A.2d 326, 329-30 (Me.), *cert denied,* 474 U.S. 947 (1985); *State v. Reny,* 511 A.2d 1066, 1067 (Me. 1986); *Town of North Berwick v. Jones,* 534 A.2d 667, 670-71 (Me. 1987); *Standish Telephone Co. v. Saco River Tel. & Tel. Co.,* 555 A.2d 478, 480-82 (Me.

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[17] Petitioners do not contest the Maine Supreme Judicial Court's finding that their damage claims could have been asserted at the time of *NCCI 2* (App. 6a-7a) except to argue that they cannot be bound with respect to the Superintendent's 1987 rate order because it was not issued until after the trial in *NCCI 2* (Petition at 8 n.7, 12 n.11). The Superior Court's decision in *NCCI 2*, however, demonstrates that the 1987 rates were in fact challenged in that case, with all parties proceeding on the assumption (which proved correct) that the maximum 10 percent rate increase would be granted. (App. 61a). Moreover, neither petitioners nor anyone else sought timely judicial review of the actual 1987 rate order when it was thereafter issued by the Superintendent. As a result, any attack which petitioners might make on that order is barred by the doctrine of administrative *res judicata. See, e.g., Maines v. Secretary of State,* 493 A.2d 326, 329-30 (Me.), *cert. denied,* 474 U.S. 947 (1985).

1989); *Maine Central R.R. v. Town of Dexter*, 588 A.2d 289, 292 (Me. 1991). This issue, although dispositive of petitioners' claims, is never addressed in the petition.

Under these circumstances, the Maine Supreme Judicial Court was fully entitled to hold, as a matter of Maine law, that because petitioners had made no showing that they could not have intervened in *NCCI 2* or that they were in any way prevented from asserting their monetary damage claims at that time, their claims for monetary damages were barred in the instant case.[18] Regardless of whether this Court would apply the doctrine of administrative *res judicata* in the same manner, the Maine Supreme Judicial Court did not violate due process in applying that doctrine in the instant case.[19]

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[18] All of this assumes that petitioners could have asserted a cause of action for monetary damages in the first place, a proposition which the Superintendent disputes for the reasons set forth above at 11.

[19] As noted above, petitioners never raised any argument in the Maine courts that they did not have notice of the NCCI litigation or could not have intervened in that litigation, as did several other insurers. *See* App. 62a-63a. In addition, petitioners' suggestion that they might not have had notice of *NCCI 2* is belied by the acknowledgement, in petitioners' Superior Court papers, of their "participation" in the *NCCI 2* litigation. In this connection, it bears emphasis that the Superintendent consistently argued below that if the claims now asserted by petitioners were not barred by *res judicata* because of petitioners' privity with NCCI, they would alternatively be barred by the doctrine of administrative *res judicata* because petitioners did not bring a timely challenge to the Superintendent's orders. *See* Superintendent's Memorandum of Law in Support of Motion to Dismiss or for Summary

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4. Petitioners' policy arguments are overblown and unsound.

The only remaining issues to consider are petitioners' policy arguments that the decision below, if left undisturbed, will inhibit associational representation and drive litigants into the federal courts. These arguments are both vastly overblown and analytically unsound. First, since both federal law and Maine law recognize that privity is an exception to the normal rule that *res judicata* does not bind nonparties, there is no reason why litigants would be forced into the federal courts as a result of the decision below and no reason why litigants in the position of petitioners would fare any better if they went to federal court.

Second, even assuming that there were some differences between federal law and Maine law on this issue, Maine is only one of fifty states and petitioners' scenario that the federal courts will somehow be flooded with millions of AARP members and other persons whose associations will be hindered from representing them is therefore extremely far-fetched. Moreover, the fact that some litigants may resort to federal court in order to take advantage of a more favorable federal interpretation of *res judicata* does not justify any encroachment on the authority of state courts to interpret state law doctrines of

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Judgment, filed in the Superior Court on June 1, 1990, at 14-15 (citing, *inter alia, Maines v. Secretary of State* and *State v. Reny*). Accordingly, if petitioners had any objection based on lack of notice, it behooved them to raise that objection in the courts below.

res judicata as they see fit, so long as there is no violation of due process.

In the final analysis, the decision below is actually quite limited, in keeping with the doctrine of privity. While petitioners here are in privity with NCCI, an organization which exists solely in order to represent workers compensation insurers including petitioners in connection with ratemaking and who brought the *NCCI 2* action in fulfillment of that function, it is not necessarily true that privity would always exist between other organizations and their members. Indeed, another premise of the decision below is that unless NCCI were representing petitioners' interests, petitioners would be bound by the doctrine of administrative *res judicata* as a result of their failure to seek timely judicial review of the Superintendent's orders. The effect of the decision below, therefore, is limited to those persons who are not only in privity with a prior litigant but who would otherwise be subject to administrative *res judicata*. As a result, the drastic effects predicted by petitioners if the decision below is not reviewed are wholly imaginary.

CONCLUSION

The petition for a writ of certiorari should be denied.

May 19, 1992

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Supreme Court, U.S.
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No. 91-1563

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

AIU INSURANCE COMPANY, AMERICAN FIDELITY COMPANY, AMERICAN HOME ASSURANCE COMPANY, BIRMINGHAM FIRE INSURANCE COMPANY OF PENNSYLVANIA, COMMERCE AND INDUSTRY INSURANCE COMPANY, GRANITE STATE INSURANCE COMPANY, INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, NEW HAMPSHIRE INDEMNITY COMPANY, INC., and NEW HAMPSHIRE INSURANCE COMPANY,

Petitioners,

v.

SUPERINTENDENT, MAINE BUREAU OF INSURANCE,

Respondent.

On Petition for a Writ of Certiorari to the Maine Supreme Judicial Court

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Respondent offers up a melange of reasons why petitioners' constitutional claims should continue to escape review. Each of these reasons is wrong.

The decision below cannot be squared with *Martin* v *Wilks*, 490 U.S. 755 (1989), on the ground that petitioners, unlike the firefighters in *Wilks*, were "in privity with a prior litigant." Respondent's Brief in Opposition ("Resp. Br.") at 15. "Privity is merely another way of saying that there is sufficient identity between parties to prior and subsequent suits for *res judicata* to apply." *Mezza* v. *General Battery Corp.*, 908 F.2d 1262, 1266 (5th Cir. 1990). Persons are in "privity" for claim preclusion purposes only when the litigating party has been authorized to represent the non-party's interests with respect to that claim. *Nevada* v. *United States*, 463 U.S. 110, 135 (1983) (citing Restatement (Second) of Judgments § 41). Where the litigating party has not been authorized to represent a non-party's interests with respect to a claim, the non-party is not bound. Restatement (Second) of Judgments § 42(1)(b). The National Council on Compensation Insurance ("NCCI") did represent petitioners' interests in its ultimately mooted attempt to enjoin Maine's insurance rate freeze, and was for that purpose in "privity" with petitioners. However, the word "privity" cannot alter the Maine Supreme Judicial Court's conclusion that NCCI was never authorized by anybody to "sue for damages on behalf of its members." *AIU Ins. Co.* v. *Superintendent*, 600 A.2d 1115, 1117-1118 (Me. 1991), App. B at 7a. As the lower court itself recognized, because NCCI did not and could not represent petitioners' individual interests in securing just compensation, the lower court's holding can be justified only if petitioners could be required to intervene in NCCI's injunctive action and present their individual damages claims.[1]

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[1] Failure to appreciate the distinction between injunctive claims, which associations may bring on behalf of their members, and damages claims, which they may not, also underlies respondent's mistaken reliance on "federal decisions" such as *Utah Power & Light Co.* v. *ICC*, 764 F.2d 865 (D.C. Cir. 1985). The D.C. Circuit, like other circuits, recognizes that associations cannot, consistent with due process, extinguish the individual rights of their members

Enactment of the Civil Rights Act of 1991 does not confirm that "the principle enunciated in *Wilks* can be altered by rule or legislation." Resp. Br. at 14. When Congress enacted this new law it carefully limited the binding effect of civil rights consent decrees, such as that in *Wilks*, to those non-parties "whose interests were adequately represented . . . ." Pub. L. No. 102-166, § 108, 105 Stat. 1071, 1076. Because the bedrock principle reiterated in *Wilks* is based upon the due process clause, neither Congress nor a state court should be allowed to flout that principle.[2]

Nor is the doctrine of administrative *res judicata* (Resp. Br. at 21) an "adequate and independent" ground for the Maine Supreme Judicial Court's decision. In the first place, the lower court did not invoke this ground; it merely observed that if NCCI had not represented petitioners in its challenge to the rate freeze law, then petitioners might not have been entitled to challenge that law in a subsequent damages action. *AIU Ins. Co.*, 600 A.2d at 1118, App. 7a. As noted above, NCCI did "represent" petitioners for the limited purpose of invalidating the rate freeze law and the rule orders issued under it. But that representation did not encompass and could not bar petitioners' damages claims. Second, under Restatement (Second) of Judgments § 83, which the Maine courts follow and upon which respondent relies, the *res judicata* effects of administrative determinations are "subject to the same exceptions and qualifications as a judgment of a court." Since general principles of *res judicata* cannot constitutionally be applied to bar petitioners' damages

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to damages. *See TRAC v. Allnet Communications Serv., Inc.*, 806 F.2d 1093, 1095-1097 (D.C. Cir. 1986).

[2] Petitioners raised their due process contention in a reply brief rather than in their opening brief before Maine's Supreme Court (Resp. Br. at 12-13 n.11) because the *res judicata* issue came before the court only when the respondent's 75-page opposing brief included a cross-appeal from the lower court's rejection of all of his affirmative defenses.

claims, neither may the principles of administrative *res judicata*.

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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